IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 1974

NO. 74-5116

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SUPREME COURT, U.S.

JACK ROLAND MURPHY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JACK ROLAND MURPHY,

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vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, JACK ROLAND MURPHY, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 10, 1974, Petition for Rehearing denied July 12, 1974.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at _____F. 2d_____(Appellate Number 73-3528, Reported June 10, 1974) and is attached hereto as Appendix A. The Order denying Petition for Rehearing dated July 12, 1974 is attached hereto as Appendix B.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was made and entered on June 10, 1974, and a copy thereof is appended to this Petition in Appendix A. The Order of the United States Court of Appeals for the Fifth Circuit denying a Petition for Rehearing was made and entered on July 12, 1974, and a copy thereof is appended to this Petition in Appendix B. The jurisdiction of this Court is

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invoked under Title 28 U.S.C. 1254 (1), and Rule 19, United States Supreme Court Rules. The Judgment of the United States Court of Appeals for the Fifth Circuit and the Order denying the Petition for Rehearing are (a) in conflict with the decision of another court of appeals on substantially the same matter; and (b) a decision on an important question of Federal law which has not been, but should be, ultimately settled by this Court. Therefore, the jurisdiction of this Court is invoked.

QUESTIONS PRESENTED

1. Whether, the Petitioner, was denied due process and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States because of the state trial court's failure to grant Petitioner's pretrial motion for a change of venue, or to exclude certain prospective jurors because:

(A) All of the prospective jurors examined had obtained knowledge from the news media prior to their examination in Court that the Petitioner had been previously convicted of either, breaking and entering or murder in the first degree.

(B) All of the prospective jurors had been subjected to extensive news media coverage for more than three years, concerning not only the facts of the case which is now before this Court, but also facts surrounding two murders which occured shortly before this case and several publicized local and state investigations dealing with Petitioner's being released on bond and with a ruling by the trial Court declaring Petitioner incompetent or insane.

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CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION
FOURTEENTH AMENDMENT

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, along with Robert Greenwood and Paul Gagnon were charged with the robbery of Mrs. Olive Wofford, a wealthy resident of Miami Beach, which occurred Sunday, January 28, 1968. The case was originally filed as Case Number 68-530 in the Criminal Court of Record in and for Dade County, Florida. During the pendency of that case, Petitioner filed a Motion for Change of Venue because of the excessive prejudicial publicity surrounding the case itself as well as the Petitioner's previous background. Prior to the trial in that case, the Petitioner was arrested for the double murder of Terry Rae Kent Frank and Annalie Mohn. These killings became notorious in the press as the "Whiskey Creek Murders".

During the pretrial proceedings in the Wofford robbery case, the Petitioner was initially admitted to bail. This caused excessive news coverage and community cries for grand jury and other state investigations. Thereafter, the

Defendant was declared incompetent to stand trial by the trial court judge. This ruling also received substantial attention in the news media and several state and county criminal investigations were begun over said controversial ruling. Because of the trial court's ruling declaring the Petitioner incompetent to stand trial, Richard Gerstein, the State Attorney for Dade County, voluntarily nolle prossed the Wofford robbery case, to wit: 68-530, so that the trial court would no longer have jurisdiction over the Defendant and he could be brought to trial in Broward County for the notorious "Whiskey Creek Murders."

On August 14, 1968, the Defendant along with Alan Kuhn, Jack Griffith and Robert Greenwood were indicted in Case Number 68-360 CR-JE, with conspiring to transport stolen securities from Los Angeles, California to Miami Beach, Florida. Said case was closely related to the "Whiskey Creek Murder case."

On March 1, 1969, the Defendant was found guilty of the murder of Terry Rae Kent Frank. On August 25, 1969 the Dade County State Attorney refiled the Wofford robbery charges against Petitioner, which case number was 69-7464, and which is the subject matter of this Petition.

Thereafter, in December of 1969, the Defendant plead guilty to Count I of the Federal Indictment in Case Number 68-360 CR-JE. On July 17, 1970, the Defendant filed a Motion for Change of Venue in the second Wofford robbery case. The state trial court deferred ruling on the motion until after an attempt was made to select a jury.

On August 27, 1970 the jury selection began. Of the 78 jurors questioned, the Defendant excused 12 preemptorily, 27 were excused for either medical, family or economic reasons; 3 were excused for various other reasons; 20 were excused because they had formed an opinion via the news media that the Petitioner was guilty and they could not give the Petitioner a fair trial. State preemptorily excused 8 jurors. Of the 8 jurors selected, none of whom were acceptable to the Petitioner their knowledge of the Petitioner, his background and the case in question, is as follows:

1. Five of the eight jurors stated that the jury panel had been discussing the Petitioner and the case and many had formed an opinion that the Petitioner was guilty.

2. Six of the eight jurors knew that the Petitioner had been a Defendant in the "Whiskey Creek Murder Case" and was found guilty of first degree murder.

3. Six of the eight jurors knew that Petitioner had been a defendant in the theft of the "Star of India and Delong Ruby" from a New York museum.

4. All of the jurors knew that the Petitioner was a convicted felon and was serving time for murder, or had served time for being involved in jewel thefts.

5. All of the jurors stated that their knowledge of the Defendant came from various parts of the news media, i.e., radio, television, newspapers, etc.

6. Four of the eight jurors testified that they had been reading the various articles in the newspapers printed during the week of jury selection.

7. Four of the eight jurors were familiar with prior rulings of the Court concerning the controversial ruling over Petitioner's competency to stand trial.

8. Many of the jurors questioned stated that the prospective jury panel had been discussing the case between themselves and many had formed an opinion that the Petitioner was guilty.

After the jury was selected, but prior to their being sworn, Petitioner renewed his Motion for Change of Venue on the basis that the jurors, although they gave assurances of being impartial, could not do so because of their knowledge of the case and their knowledge of Petitioner's past criminal conduct and convictions. The motion was also renewed on the basis that jurors who had knowledge of Petitioner's prior criminal record should not be permitted to sit as jurors and should be excused. During this part of the argument, Petitioner introduced the following exhibits into evidence in support of the motions:

1. Defendant's Exhibit "F" which was an Order dated July 8, 1968, removing the trial of the co-defendants in the Wofford robbery case to another county because of the Court's failure to control publicity surrounding the case.

2. Defendant's Exhibit "G" which was a hearing on a Motion to Change Venue in the United States District Court for the Southern District of Florida, Case Number 68-360 dated March 6, 1969.

3. Defendant's Exhibit "H" entitled "Order of Transfer" wherein the United States District Court, on April 21, 1970, transferred Case Number 68-360 to Pensacola, Florida for trial.

Notwithstanding all of the exhibits and the difficulty in selecting an impartial jury, the state trial Court denied the motion to change venue as well as the motion to exclude those jurors with knowledge of the Petitioner's past criminal record.

After a jury trial, the jury returned a verdict finding the Petitioner guilty of Count I, to wit: Breaking and entering a dwelling with intent to commit a felony, to wit: Robbery and guilty of Count II, to wit: Assault with intent to commit a felony, to wit: Robbery. The Court thereafter adjudged the Petitoner guilty on both counts. On Count I the Petitioner was sentenced to life in prison, on Count II the Petitioner was sentenced to twenty (20) years, said sentence to run consecutive to the sentence in Count I.

Thereafter the Defendant appealed to the District Court of Appeals of Florida, Third District. Court affirmed the judgments and convictions which opinion is recorded in 252 So. 2d 385 (Fla. Appeals 1971). A copy of said opinion is attached hereto as Exhibit "C".

Thereafter Defendant filed a Petition for Writ of Habeas Corpus in the United States District Court, Southern District of Florida. That Court's opinion is found at 363 F. Supp. 1224, (S. D. Fla. 1973) and is attached hereto as Appendix D.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed by this Court for the following reasons:

I

A. PRETRIAL PUBLICITY CONCERNING PETITIONER'S PAST CRIMINAL RECORD

Most of the prospective jurors questioned, and all of the jurors who sat on the case, knew that the Petitioner had been convicted of either a jewel theft, murder, or possession of stolen securities; and that Petitioner was in fact presently incarcerated in Raiford State Prison.

It is clear, under both Florida and Federal law, that the only proper way of introducing prior convictions is in an attempt to impeach or discredit the defendant's character, should he offer evidence in his own behalf at the time of trial. See Davis v. United States, 413 F. 2nd 1226, (5 Cir. 1969), United States v. Stallings, 437 F. 2d 1057 (5 Cir. 1971) and Fla. R. Evid. §99 (1967).

In Marshall v. United States, 360 U.S. 310, 79 S. Ct. 1171 (1959) a case recognized by both the Federal District Court in its opinion and the Fifth Circuit Court of Appeals as being a case factually identical to the case at bar, the Defendant was charged with unlicensed dispensing of drugs. During the trial defendant never took the witness stand. Also during the trial, newspaper articles containing information about the defendant's past criminal record reached members of the jury. In reversing the conviction, the Court stated:

> "... we have the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great, when the evidence reaches the jury through news accounts as when it is a part of the prosecutions evidence..."

The Petitioner is well aware that in Marshall v. United States, Supra, this Court's action was taken in that direct criminal appeal pursuant only to its inherent supervisory powers and not in terms of due process standards. It is with this problem that the Court is now confronted. The United States Court of Appeals for the Fifth Circuit in affirming the decision of the United States District Court quoted the language of the District Court opinion as follows:

> "Although the situation in Marshall is factually similar to the instant case, the rationale of that opinion militates against Petitioner's position. The Court, then, finds that a trial by jurors, each of whom has obtained knowledge of a defendant's past felony convictions through pretrial publicity does not, in light of the Supreme Court's refusal to so find, raise to constitutional proportions when each juror has satisfied the impartiality requirements set forth in Irvin v. Dowd, Supra. The Court recognizes that the distinction between acts or occurances which warrant the exercise of federal supervisory powers and those which reflect the denial of due process is often a nebulous one. Nevertheless, the dictates of federalism compel this Court to abide by the distinction whenever it exists. Petitioner's claim regarding the effects of pretrial publicity must fall."

This portion of the Court's opinion is incorrect, and fails to take into consideration the decisions of this Honorable Court and of the other United States Courts of Appeals since the ruling in Marshall v. United States, Supra.

Prior to 1959, the federal courts applied the same standards in prejudicial publicity cases, whether the case arose in either the state or federal courts. That rule required actual showing of prejudice. However, in 1959, Marshall v. United States, Supra, as previously quoted, changed that rule but only in the federal courts, holding that even though jurors stated they would not be influenced by prejudicial articles, the court reversed on the basis that the publicity of past criminal record in and of itself was so prejudicial that it required reversal.

In Irvin v. Dowd, 1961, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751, this Court reaffirmed the view announced in Marshall v. United States, Supra, to wit: That prejudicial infection of a jury is not cured by statements of the individual jurors that they will not be influenced by said prejudicial infection. It is important to point out at this point that

in Irvin v. Dowd, Supra, the Court was not dealing with a federal criminal prosecution, but rather the case was before the Court as a result of a habeas corpus petition filed by a state prisoner.

In Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663 (1963), which was another state court action, this Court found that it was not necessary to show actual prejudice, and furthermore, it was not even necessary to show that the prejudicial material had ever reached the jury. If information was prejudicial and widespread in the community, the defendant without even making an actual showing was entitled to relief.

In June of 1966, this Court decided the case of Sheppard v. Maxwell, 1966, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600. In that case, this Court concluded that Sheppard did not receive a fair trial consistent with the due process clause of the Fourteenth Amendment and, therefore, reversed the judgment. Although the pretrial publicity in Sheppard did not deal with a past criminal conviction, the Court in its dictum made the following comments concerning Marshall v. United States, Supra:

> "... freedom of discussion should be given the widest range compatible with the essential requirements of the fair and orderly administration of justice. Pennykamp v. State of Florida, 328 U.S. 331, 347, 66 S. Ct. 1029, 1037, 90 L. Ed. 1295 (1946). But it must not be allowed to divert the trial from the 'very purpose of a court system... to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.' Cox v. State of Louisiana, 379 U.S. 559, 583, 85 S. Ct. 466, 471, 13 L. Ed. 2d 487 (1965) (Block, J., dissenting). Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in Marshall v. United States, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959), we set aside a federal

> conviction where the jurors were exposed 'through news accounts' to information that was not admitted at trial. We held that the prejudice from such material 'may indeed be greater' than when it is part of the prosecution's evidence 'for it is then not tempered by protective procedures.' At 313, 79 S. Ct. at 1173. At the same time, we did not consider dispositive the statement of each juror 'that he would not be influenced by the news articles that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles.'...

In 1973 the Third Circuit Court of Appeals held in United States, ex rel. Doggett v. Yeager, 472 F. 2d 229 (3rd Cir. 1973) stated at page 237 of its opinion that:

> "...Marshall v. United States, Supra, while factually controlling in this case, is distinguishable on the ground that involved the Supreme Court's supervisory power over a lower federal court rather than its constitutional power to enforce the Fourteenth Amendment's due process standards. But soon after 1959 it became clear that the former rule was no longer applicable in state trials....".

The Fifth Circuit Court of Appeals in its opinion in this case recognized that said opinion was in conflict with the view announced in United States, ex rel. Doggett v. Yeager, Supra, the Court stating at page 4659, footnote 4:

> "We are aware of the view announced in United States, ex rel. Doggett, 3 Cir.1973, 472 F. 2d 229, 237-239, that Irvin v. Dowd, Supra, and Sheppard v. Maxwell, Supra, broadened the Marshall holding so as now to require that its rule be applied in state trials. While the question arose in a prejudicial publicity-change or venue setting in Doggett, we do not seriously doubt that the Third Circuit would apply its holding equally in a situation involving, as presently under discussion, denials of challenges for cause based on a jurors knowledge of prior convictions. With deference, we disagree with our sister circuit's conclusion and decline here to be guided by Doggett".

In United States v. Isaacs, 351 F. Supp. 1323 (1972), the District Court reached the same decision as the Third Circuit reached two years later, holding that "we view Sheppard as an application of the rule of Marshall v. United States,...at page 1328".

It is clear that the opinion of the United States Court of Appeals for the Fifth Circuit in the instant case is diametrically opposed to the opinion of the United States Court of Appeals for the Third Circuit and United States, ex rel. Doggett v. Yeager, Supra. Both opinions present contrasting views on an important federal question which affects the constitutional rights of not only the Petitioner herein but of all defendants who are required to appear before the bench to defend themselves in a criminal trial. From the record in this case as well as from the decision cited herein both state and federal, the following can be ascertained. All state jurisdictions as well as the federal jurisdictions prohibit either direct or circumstantial evidence concerning the defendant's past criminal record to be introduced at the trial of any defendant, unless or until such time as said defendant takes the witness stand in his own behalf. In the case at bar, the defendant did not take the witness stand. Nor did the state attempt to introduce through either direct or circumstantial evidence any facts relating to the Petitioner's past criminal record. Notwithstanding that fact, each and every one of the jurors seated, had learned of the Petitioner's extensive past criminal record through the news media.

It has long been the rule that federal courts will not permit state courts to arbitrarily deny to a defendant in a criminal case important rules of criminal procedure which

are guaranteed in all jurisdictions to all criminal defendants. To permit such conduct by the state trial courts, constitutes a clear denial of equal protection of law as guaranteed to a defendant in a state court prosecution under the Fourteenth Amendment of the United States Constitution. When the laws governing criminal cases are not applied equally to all individuals either guilty or innocent, then the ultimate results will be a breakdown in the integrity of the administration of justice. In the instant case, it is obvious that the state trial court, as well as the state appellate courts based their opinion more upon the defendant's horrendous criminal background than upon the accepted rules governing the administration of criminal justice in the State of Florida. This Honorable Court cannot permit the state courts to act so arbitrarily on such a precious constitutional right as a right to a fair and impartial trial by a jury of ones peers. As so aptly put by Judge Cuthbert Pound in his dissenting opinion in People v. Gitlow, 234 N.Y. 132, 158 (1922), "the defendant may be the worst of men ... [T]he rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected." The appellate court's opinion in this case if upheld by this Honorable Court, will open the doors to allowing the states to arbitrarily determine which uniform rules of law will apply to a particular defendant in a particular case. Such a condition cannot be permitted to exist. The Court of Appeals in its opinion recognized the seriousness of the question presented to it by Petitioner's appeal. The Court further recognized a diametrically opposed opinion by the Third Circuit on a question of constitutional

law which affects every defendant who elects to be tried by a jury of his peers.

Additionally, it should be pointed out that the Court of Appeals for the Fifth Circuit failed to consider the momentous opinion of Duncan v. State of Lousiana, (1968) 391 U.S. 145, 88 S. Ct. 1444. In said case this Court held that a trial by jury in criminal cases is fundamental to the American scheme of justice, and that the Fourteenth Amendment to the United States Constitution guarantees a right of jury trial in all criminal cases which, were they to be tried in a federal court, would come within the Sixth Amendment guarantee. By its opinion in Duncan v. State of Louisiana, Supra, this Court has made applicable in all state criminal jury trials those rules applicable in federal criminal jury trials. Therefore, even if the Court of Appeals for the Fifth Circuit rejects the conclusion of the Third Circuit in Unites States, ex rel. Doggett v. Yeager, Supra, it cannot reject the mandate of this Court in Duncan v. State of Louisana, Supra.

It is for these reasons that this Court is asked to review the opinion of the United States Court of Appeals for the Fifth Circuit and ultimately to reverse that opinion and remand this cause back to the state trial courts for a new trial.

B. PRE-TRIAL PUBLICITY ON THE CASE IN CHIEF.

The various exhibits which are part of the record in the United States Court of Appeals for the Fifth Circuit established that over a period of two and one-half years, the publicity concerning the Defendant with regard to the case at bar, an also regarding the "Whiskey Creek Murders" of which Defendant was convicted only five months prior to

the trial in the case now before this Court, was so overwhelming and so prejudicial that it was impossible to obtain a jury which could sit fairly and impartially. Petitioner would agree with that portion of the United States Court of Appeals' opinion wherein the Court stated that there was a substantial period of time where there had been no publicity concerning the Petitioner. However, notwithstanding this gap of time in which the publicity was minimal if nonexistent, the jurors in this case clearly had excellent recollection of all of the events surrounding the Petitioner's past criminal exploits.

In Sheppard v. Maxwell, Supra, this Court reversed a murder conviction of Dr. Sheppard because of the pretrial publicity which attended the trial of the defendant. In doing so, the Court set down the fundamental rule of law to be followed:

> "...due process requires that the accused receive a trial by an impartial jury free from outside influence. Given the pervasiveness of modern communications and the difficulty of affecting prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused. And appellate tribunals have the duty to make and independent evaluation of the circumstances....but where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates or transfer it to another county not so permeated with publicity..." (Citation Omitted)

In the case at bar, the motion for change of venue which was filed with the state trial court did not evolve around the sole fact that the news media published accounts of the case. The matters which clearly established the necessity for change of venue were:

1. The news media's earlier attack on the trial court judge for reducing the Defendant's bond in the first case which was filed, to wit: Case Number 68-530.

2. The news media's earlier prejudicial reporting concerning the state trial court's ruling declaring the Defendant incompetent in Case Number 68-530. There was such a public outcry over said ruling that several highly publicized investigations were conducted at both the state and county level.

3. The news media's continued reporting of Defendant's past criminal life and convictions.

4. The trial court's complete failure to make any attempt to control the publicity so as not to prejudice the Defendant. In fact, the trial court sought publicity because the judge was running for re-election. This is evident by the fact that the trial judge continued or transferred all of his other cases with the exception of Defendant's case and that of the also highly publicized Charles Celona case. In fact, the judge was trying both cases at the same time, devoting the mornings to Defendant's trial and the afternoons to the Celona trial.

The fact that the trial court took no steps to control publicity was readily shown by the Court's earlier order of July 8, 1968, concerning the trial of the two co-defendants in the within cause. The state trial court citing Sheppard v. Maxwell, Supra, admitted that he had failed to control publicity which had saturated the community, and therefore changed the venue for those two co-defendants. It is clear from the record now in the Court of Appeals for the Fifth Circuit that at no time either prior to or during the jury selection, did the trial Court take any steps whatsoever to control what the jurors read, said or did concerning JACK ROLAND MURPHY, the Petitioner herein.

Above and beyond, the trial Court's failure to take steps to protect the Defendant, is the actual knowledge of each of the individual jurors involved. The Statement of Facts in this Petition as well as the record now before the Court of Appeals for the Fifth Circuit clearly establishes each jurors familiarity with the Defendant not withstanding the fact that a substantial portion of the publicity surrounding the Petitioner had occurred months prior to the actual trial of the within cause. In United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2nd Cir. 1963), the Court in a case similar to the case at bar held:

> "We have examined the record, including voir dire examination of the jurors challenged or execused, which was not before Judge Cashin. His conclusion that lack of impartiality of the trial jury had not been established appears to us clearly erroneous. Jury impartiality must be measured by the standards established by the Supreme Court in the line of cases culminating in Irvin v. Dowd . . . . There the court traced the history of the development of the rule in the fact of the wide growth of crime coverage by expanding news, pointing out the right to a fair trial by a panel of impartial, 'indifferent jurors', the growing difficulty of obtaining a panel who has never heard of a well known case, the acceptability of a juror who had some preconceived notion of guilt or innocence, provided the juror could lay aside his impression or opinion and render a verdict based on the evidence presented in court. Applying these rules to the facts of that case, however, it was made plain that merely going through and obtaining the jurors' assurances or impartiality is insufficient. The reviewing court must determine from a review of the entire voir dire whether the extent and nature of the publicity had caused such a build up of prejudice that excluding the preconception of guilt from the deliberations would be too difficult for the jury to be honestly found impartial."

As shown from the breakdowns of the jurors' statements, the jury had sufficient knowledge of this case, including the

controversial ruling concerning bond and the Petitioner's sanity, as well as Petitioner's past criminal background that the interest of justice would have best been served had the trial Court granted the motion for change of venue. The comments of one particular juror amply sets forth the demeanor and thoughts of the prospective jury panel which was being questioned.

> "Q. (MR. NAGELEY) Now, did you hear any of the panel, prospective panel, discussing the Murph the Surf case?
>
> A. (MR. FERGUSON) Sure.
>
> Q. And, would you tell us generally what was the nature of the discussions?
>
> A. Well, its just -- talk. I would say seriously -- I would say that I thought that some of the discussions that I overheard, that the people involved with, seriously from what I heard, made me sick to my stomach."
>
> * * * *
>
> "Q. But tell us what the comments were that caused you to feel sick to your stomach?
>
> A. Like, "hang him, he is guilty'. This kind of thing."

Comments such as this as well as the examination of all of the jurors involved, clearly reflect that the possibility of obtaining a fair and impartial jury in light of all of the publicity, surrounding the Petitioner, JACK ROLAND MURPHY, as well as each jurors' knowledge of the Defendant's past criminal record practically non-existent notwithstanding any assurances which said jurors might have given the Court.

By way of analogy, it is noteworthy to point out to this Court that the State trial Court Judge was advised of an Order entered by Federal Judge Joe Eaton in the United States District Court, Case No. 68-360 transferring the trial of JACK ROLAND MURPHY and the other co-defendants to Pensacola, Florida. The Order transferring the federal

case, occurred at just three months prior to the trial of this case. In a hearing held by Judge Eaton several months prior to the entry of his Order transferring the case the Court recognized the extensive notoriaty of the Whisky Creek murder case by stating the following:

> "People in this county can tell you who Murph the Surf is, who would not have the slightest idea who Earl Faircloth is, and I think this is a fair statement . . . . this man is simply too widely known."
>
> . . . I am not trying to be funny about it, but it is perfectly obvious for weeks after the matter with Judge Stedman, his ruling, I could not go to a social event, I would want to sit down and talk about the Dolphins, but everybody there wanted to ask me about Murph the Surf . . ."

Notwithstanding the fact that these comments were made by JudgeEaton on March 6, 1969, it is quite obvious that at least three months prior to the trial in the Wofford case the Judge by his order transferring the federal case to another county recognized that the publicity and notoriaty surrounding JACK POLAND MURPHY the Petitioner herein still existed.

CONCLUSION

For the reason set forth in this Petition and based upon the cases cited therein, the Petition for Certiorari should be granted and the Judgment of the Court of Appeals reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

_____TERM, 1974

NO. 74-5116

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STATE OF FLORIDA,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX "A"

Jack Roland MURPHY, Petitioner-Appellant,

v.

STATE OF FLORIDA, Respondent-Appellee.

No. 73-3528.

United States Court of Appeals,
Fifth Circuit.

June 10, 1974.

State prisoner petitioned for habeas corpus. The United States District Court for the Southern District of Florida, at Miami, C. Clyde Atkins, J., 363 F.Supp. 1224, denied the petition, and petitioner appealed. The Court of Appeals, Simpson, Circuit Judge, held that (1) failure to grant defendant's motion for a change of venue on ground of prejudicial pretrial publicity was not a denial of due process, (2) trial by jurors who knew that defendant was a convicted felon did not rise to constitutional proportions and was thus not ground for issuance of writ, and (3) refusal of state trial court to grant a bifurcated trial on the issues of guilt and sanity did not rise to constitutional dimensions and was therefore not ground for issuance of writ.

Affirmed.

1. Constitutional Law ⇐259

Failure to grant defendant's motion for a change of venue on ground of prejudicial pretrial publicity was not a denial of due process, where newspaper articles were largely factual rather than inflammatory, where most of the publicity occurred a year and a half to three years prior to trial, and where the five jurors who had some knowledge of the facts of the robbery possessed only a vague recollection thereof.

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INDEXED

2. Habeas Corpus ⇐85.3(1)

Statement made by federal judge 16 months prior to state court trial of robbery case, and addressed to entirely different considerations, was irrelevant in the context of habeas corpus petition attacking state court convictions.

3. Habeas Corpus ⇐55.5(8)

Trial by jurors who knew that defendant was a convicted felon did not rise to constitutional proportions and was thus not ground for issuance of writ of federal habeas corpus, where each juror satisfied impartiality requirements in light of their assurances to the court that they would reach a verdict based solely on the evidence introduced at trial.

4. Habeas Corpus ⇐45.2(1)

Refusal of state trial court to grant a bifurcated trial on the issues of guilt and sanity did not rise to constitutional dimensions and was therefore not ground for issuance of writ of federal habeas corpus.

5. Constitutional Law ⇐263

Due process does not require a separate trial, and the states and their courts are free to determine whether the issues of guilt and sanity should be tried separately or together.

Appeal from the United States District Court for the Southern District of Florida.

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

The lower court, by a reported opinion, Murphy v. State of Florida, S.D.Fla.1973, 363 F.Supp. 1224, denied appellant's petition for habeas corpus relief from two state sentences received in a single trial, to life imprisonment for armed robbery and consecutively to twenty years imprisonment for assault with intent to commit robbery. We affirm.

The attack upon the state convictions both in the trial court and here is based primarily upon a claim of denial of Fourteenth Amendment due process because of extensive pre-trial newspaper publicity regarding Murphy, known as "Murph the Surf",[1] and resultant prejudice to his Sixth Amendment right to a trial before an impartial jury. Inasmuch as the background facts are fully set forth in the lower court's opinion,[2] a brief outline of them will suffice here.

The issues here as below are (1) whether the Florida state trial court erred in denying appellant a change of venue in the light of the pre-trial publicity; (2) whether that court erred in failing to dismiss for cause those trial jurors who knew Murphy was a convicted felon; and (3) whether that court erred in refusing to bifurcate the trial on the issues of guilt and sanity.

Petitioner was arrested with three other persons in January 1968 as they fled the scene in Dade County, Florida of the robbery of Mrs. Olive Wofford, a wealthy resident of Miami Beach. In May, 1968 before his trial for the Wofford robbery, the petitioner was arrested and indicted for the double murder in an adjoining Florida county, Broward, of two young women, Terry Rae Kent Frank and Annalie Mohn. These killings became notorious in the press as the "Whiskey Creek Murders."

Pre-trial proceedings in the Wofford robbery case involved the trial judge's controversial ruling as to the petitioner's competency to stand trial. Extensive newspaper coverage again occurred. The robbery charges in the Wofford case were nolle prossed to permit the Broward County trial for the Whiskey Creek Murders to proceed. In August 1968, prior to that murder trial, Murphy and three others were indicted by a

1. Murphy had received nationwide press attention in 1964 for his role in the theft of the "Star of India" sapphire from the New York Museum of Natural History. The public media's use of the nickname "Murph the Surf" dated from that time.

2. Adopted as correct by both parties to this appeal.

federal grand jury for conspiring to transport stolen securities in interstate commerce, charges related to the Whiskey Creek case and so played up in the press. Murphy was found guilty on March 1, 1969, of one of the Whiskey Creek Murders, that of Terry Rae Kent Frank. Again, the trial and its result were extensively publicized by the news media.

Thereafter on August 25, 1969, the state prosecutor refiled the Wofford robbery case. In December of the same year, Murphy pled guilty to one count of the federal indictment.[3] During the early July 1970 pre-trial proceedings in the Wofford case, Murphy moved for change of venue on the basis of prejudicial pre-trial publicity, including the publicity attendant upon the earlier hearing in the Wofford robbery case, the Star of India theft, the Whiskey Creek Murders, and the

3. A statement made by the presiding judge, U. S. District Judge Eaton, in the course of these proceedings did not occur shortly before the Wofford robbery trial in the state court, as stated by appellant's brief. The record shows that Judge Eaton's statement was made at a March 6, 1969 hearing, not at a 1970 hearing, as appellant's brief seems to indicate. At that hearing Judge Eaton granted a continuance of the case before him, No. 68-360, rather than rule on a motion for change of venue. His ruling was based on expediency:

> "I am forgetting the question of prejudice and being very practical about it . . . . I think if we tried to do that next week, that we would spend a week on voir dire and never conceivably get a jury. Speaking of the time in Court, I have five other criminal cases I could be trying while we are asking these folks if they know anything about Murph the Surf, because I am telling you, they do. People in this County can tell you who Murphy is, who would not have the slightest idea who Earl Faircloth is, and I think that is a fair statement. I am not talking about any prejudicial newspaper coverage at all. It may be that because Mr. Murphy has simply sort of, somehow or another, become pretty good publicity; but the point is, considering for a moment every count in every trial which was ever had was entirely fair, this man is simply too widely known, and so is Griffith and Kuhn, to some degree."

As noted in the text, Murphy pled guilty to one count of this indictment in 1969. Judge Eaton thereafter granted a change of venue to Pensacola in the Northern District of Florida to the remaining defendants under that indictment. Their case was tried and disposed of by him in Pensacola in April 1970.

federal conspiracy charges. The state trial judge deferred ruling on this motion pending voir dire examination of the jury panel. Voir dire commenced on July 27 and was completed on August 10, 1970. Of 78 veniremen questioned, 12 were excused peremptorily by the petitioner, and 8 by the state, 27 were excused for medical or economic reasons and 3 were excused for miscellaneous reasons. 20 were excused because they stated that they had formed an opinion as to petitioner's guilt and could not give him a fair trial. 8 jurors were selected to serve at the trial, 6 regular and 2 alternate.

Of the 8 selected, 5 had read or heard about the facts surrounding the Wofford robbery through the media, from discussions with friends or through discussions with other prospective jurors. Each of the eight knew that Murphy had previously been convicted either in the Star of India theft or the Whiskey Creek Murders, but each assured the court that he would reach a verdict based solely on evidence introduced at the trial. The court denied the motion for change of venue and the trial proceeded. Murphy's plea of insanity was rejected and he was convicted and sentenced, as noted supra, to life imprisonment and to a term of twenty years consecutive thereto.

The court below carefully weighed the claim of denial of due process on the basis of prejudicial pre-trial publicity, accepting his "duty to make an independent evaluation of the circumstances", Sheppard v. Maxwell, 1966, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, but imposing upon the petitioner the burden of showing that his conviction was a result of "essential unfairness . . . not as a matter of speculation but as a demonstrable reality", Adams v. United States ex rel. McCann, 1942, 317 U.S. 269, 281, 63 S.Ct. 236, 242, 87 L.Ed. 268. The district court was "sensitive to the delicate balance that must be struck as a result of the pervasiveness of modern communications and the need to insure a fair trial for the accused", 363 F.Supp. at 1226, adopting the approach set forth in United States v. Agueci, 2 Cir. 1962, 310 F.2d 817, cert.

denied, 1963, 372 U.S. 959, 83 S.Ct. 1016, 10 L.Ed.2d 12; Irvin v. Dowd, 1961, 366 U.S. 717, 722–723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751, and Reynolds v. United States, 1878, 98 U.S. 145, 156–157, 25 L.Ed. 244. The district judge found the presence of some objective criteria, Beck v. Washington, 1962, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98, in the nature and the time span of the pre-trial publicity. We are in agreement with his determination that since the newspaper articles were largely factual rather than inflammatory, and since the dates of the news clippings and edited television news releases were almost entirely between December 15, 1967 and January 24, 1969 (only five articles being presented to the court bearing dates of the period of the jury selection and only one of those being a front-page article) the passage of time is a crucial factor in this case. We find no record basis upon which to disturb his finding that "each of the five jurors who had some knowledge of the facts of the Wofford robbery possessed only a vague recollection of the facts." 363 F.Supp. at 1229.

[1] We agree with the district court that the failure to grant the motion for change of venue was not a denial of due process.

[2] In this connection the petitioner urges that the language used by Judge Eaton (quoted Note 3, supra) in granting a continuance in the federal conspiracy trial show that a change of venue was mandated in the Wofford robbery trial in state court. This is a new contention, not relied upon before the district court. These remarks were as Judge Eaton stated, not based on the question of prejudice, but entirely on his own estimate of the practicalities of the situation and the conservation of his own judicial time. Made as it was sixteen months prior to the state court trial of the Wofford robbery case, and addressed to entirely different considerations, his statement is irrelevant in the context of this habeas corpus petition. We find petitioner's argument in this respect to be without substance.

[3] The second issue, whether each juror who possessed knowledge of Murphy's previous felony convictions, should have been excluded for cause is, as stated by the court below, more troublesome, but we affirm his rejection of this ground of attack by his excellent analysis at pages 1229–1230, 363 F.Supp. As pointed out there, Marshall v. United States, 1959, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250, will not support issuance of the writ on this ground, since as the Supreme Court was at pains to point out, 360 U.S. at 313, 29 S.Ct. at 1171, its action was taken in that direct criminal appeal pursuant only to its inherent supervisory powers and not in terms of due process standards. We think the district court correctly appraised the situation in its refusal on grounds of federalism to grant the writ on this ground of the petition.[4] The district court's holding in this respect is well summarized in the following language:

> "Although the situation in *Marshall* is factually similar to the instant case, the rationale of that opinion militates against Petitioner's position. This Court, then, finds that a trial by jurors, each of whom has obtained knowledge of a defendant's past felony convictions through pre-trial publicity does not, in light of the Supreme Court's refusal to so find, rise to Constitutional proportions when each juror has satisfied the impartiality requirements set forth in Irvin v. Dowd, supra. The Court recognizes that the distinction between acts or occurrences which warrant the exercise of federal supervisory powers and those which reflect a denial of due process is often a nebulous one. Nevertheless, the

4. We are aware of the view announced in United States ex rel. Doggett, 3 Cir. 1973, 472 F.2d 229, 237–239, that Irvin v. Dowd, supra, and Sheppard v. Maxwell, supra, broaden the *Marshall* holding so as now to require that its rule be applied to state trials. While the question arose in a prejudicial publicity-change of venue setting in *Doggett*, we do not seriously doubt that the Third Circuit would apply its holding equally in a situation involving, as presently under discussion, denials of challenges for cause based on a juror's knowledge of prior convictions. With deference, we disagree with our sister Circuit's conclusion and decline here to be guided by *Doggett*.

dictates of federalism compel this Court to abide by that distinction whenever it exists. Petitioner's claim regarding the effects of pre-trial publicity must fall." 363 F.Supp. at 1230.

[4, 5] Finally, we agree with the holding below that the final ground of attack, the refusal of the state trial court to grant a bifurcated trial on the issues of guilt and sanity, does not rise to constitutional dimensions. Due process does not require a separate trial and the states and their courts are free to determine whether such issues should be tried separately or together. United States v. Huff, 5 Cir. 1969, 409 F.2d 1225, cert. denied, 1969, 396 U.S. 857, 90 S.Ct. 123, 24 L.Ed.2d 108.

The judgment appealed from is in all respects

Affirmed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX "B"

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

July 12, 1974

TO ALL COUNSEL OF RECORD

Re: 73-3528 MURPHY V. STATE OF FLORIDA

Gentlemen:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By Anne D. Parent
Deputy Clerk

cc: Mr. Harvey S. Swickle
Mr. J. Robert Olian
Mr. Robert L. Shevin
Mr. William L. Rogers

APPENDIX "C"

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1971

JACK ROLAND MURPHY, **

Appellant, **

vs. ** CASE NO. 70-996

THE STATE OF FLORIDA, **

Appellee. **

**

Opinion filed September 21, 1971.

An Appeal from the Criminal Court of Record for Dade County, Carling Stedman, Judge.

Jack R. Nageley and Harvey S. Swickle, for appellant.

Robert L. Shevin, Attorney General, and J. Robert Olian, Assistant Attorney General, for appellee.

Before SWANN, C.J., and PEARSON and BARKDULL, JJ.

PER CURIAM.

The appellant was tried before a jury in the Criminal Court of Record for Dade County upon a two count information charging the defendant with (1) breaking and entering a dwelling with intent to commit a felony, to wit: robbery, and (2) robbery. The jury found him guilty upon count 1 and guilty of the lesser included offense of assault with intent to commit a felony to wit robbery upon count 2. He was adjudicated guilty on each count and sentenced to life in prison upon count 1, and to 20 years upon count 2. This appeal is from the judgment and sentence.

Appellant presents five points upon appeal. They are as follows: 1. The court erred in denying appellant's motion for a change of venue. 2. The court erred in denying appellant's motion to excuse for cause each of the members of the jury panel because of knowledge of appellant's past criminal record. 3. The court erred in denying appellant's motion to strike the testimony of the state's psychiatrists. 4. The court erred in denying appellant's motion for a bifurcated trial on the issues of guilt and insanity. 5. The evidence was insufficient as to count 1 because it was insufficient to establish ownership of the dwelling which was broken into by appellant.

Appellant directs the major portion of his brief and argument to point 1. Appellant's motion for change of venue was filed prior to trial and the court deferred ruling until after jury selection began. It was renewed after a jury was seated and the motion was denied. The motion had attached as exhibits many newspaper reports. Most of these newspaper stories concerned other criminal charges against the appellant; the trial of these charges and the adjudication that appellant was guilty of the charges. An examination of these reports reveals that they are for the most part factual accounts. There is no demonstration or argument that the reports were highly colored or inflamatory.

Seventy-eight jurors were called. The appellant excused 12 peremptorily and the state excused 8; 30 were excused for reasons not related to this appeal; 20 were excused because they might have formed an opinion as to appellant's guilt. A jury of six and two alternates were sworn.

Appellant's argument under point 1 asserts that the exhibits attached to the motion and those presented in court demonstrate such "overwhelming prejudicial publicity against the defendant

with regard to the case at bar and - (his) past criminal life" [emphasis supplied] that the exposure of the prospective jurors to these printed accounts demonstrates an abuse of discretion in the denial of his motion for a change of venue. He relies upon the law as established in Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L.Ed. 2d, 600 (1966), and expounded in United States v. Denno 313 F.2d 364 (2nd Cir. 1963); Pamplin v. Mason, 364 F.2d 1, (5th Cir. 1966).

In considering the error urged we begin with the basic fact that we are reviewing a discretionary ruling by the trial judge and that we ought not to reverse unless an abuse of that discretion is made to appear. Singer v. State, Fla. 1959, 109 So.2d 7. We recognize that where the record reveals a likelyhood of bias by the jury a question of appellant's constitutional right to a fair trial is involved and federally established standards must be applied.

Our review of the record before us convinces us that this point must be decided adversely to the appellant's contention, upon the rule stated in Collins v. State, Fla.App.1967, 197 So.2d 574, modified for other reasons 203 So.2d 28. We further hold that upon the application of the test set forth in Pamplin v. Mason, 364 F.2d 1 (5th Cir. 1966) no violation of appellant's constitutional right to a fair trial appears.

Point 2, which urges that the trial court erred in denying appellant's motion to excuse for cause each member of the jury panel, covers much of the same ground as the argument under point 1. The contention is that because the members of the panel knew or must have known of appellant's conviction for other crimes that they were not

qualified as jurors. The appellant presents no authority for his statement that a knowledge of a prior conviction disqualifies a juror. We do not think that reason supports such a contention. Florida Statute § 910.03 provides that criminal prosecutions shall be tried in the county where the offense is committed. This direction implies a trial by fellow citizens, many of whom may know the defendant. The concept that a trial should be in a vacuum in order to be fair finds no basis in our legal tradition. Absent a showing of bias it is presumed that the jurors will base their verdict upon the evidence given at the trial. No error appears under point 2. See Singer v. State, Fla.1959, 109 So.2d 7; McCullers v. State, Fla.App. 1962, 143 So.2d 909.

Appellant's third point argues that the trial court should have excluded the testimony of the two court appointed psychiatrists at the hearing held before trial to determine appellant's competency to stand trial. It is urged that because the psychiatrists obtained all their information from interviews with the appellant and there were no independent "tests" that their testimony as to appellant's mental condition was incompetent. Appellant relies upon Cirack v. State, Fla.1967, 201 So.2d 706 and Martin v. State, Fla.App.1969, 218 So.2d 195 for this proposition. We do not think the authority cited supports a reversal here. The cases cited hold that where the testimony of a witness is based upon a particular evidentiary statement from the defendant the testimony may be excluded. Here the appointed physicians reported their conclusions from their observations and their interview with the defendant. Such medical procedure has not

been shown to be incompetent.

Appellant's fourth point urging a right to a separate trial on the issue of insanity is not supported by authority in this state and is without merit. Also appellant's fifth point directed to the sufficiency of the evidence of the ownership of the dwelling is without merit. Young v. State, Fla.App.1964, 162 So.2d 297.

Affirmed.

APPENDIX "D"

FILED

AUG 29 1973

JOSEPH L. BOGART
CLERK, U. S. DIST. CT.
SOUTHERN DIST. OF FLA.
MIAMI FLA.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 73-151-Civ-CA

JACK ROLAND MURPHY,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ORDER DENYING PETITION FOR HABEAS CORPUS

Petitioner, Jack Roland Murphy, is before the Court upon filing of his second Petition for Writ of Habeas Corpus.[1] In the instant petition, Murphy contends that his confinement, which stems from a 1970 conviction in Dade County Criminal Court, is unlawful in that (1) the trial court erred by denying his motion for a change of venue in light of allegedly prejudicial pre-trial publicity; (2) the trial court failed to dismiss for cause those jurors who knew that Petitioner was a convicted felon; (3) the trial court committed reversible error in denying Petitioner's motion to bifurcate the trial on the issues of guilt and sanity.

To fully appreciate the issues raised by Petitioner, it is necessary to set forth much of his notorious background. Prior to his involvement in the crime which is the subject of this petition, Murphy had focused nationwide attention on himself for his role in the 1964 theft of the "Star of India" sapphire from the New York Museum of Natural History. As a result of that enterprise and because of certain physical characteristics, Murphy was popularly referred to as "Murph the Surf."

On January 28, 1968, Petitioner and three others were apprehended as they fled from the scene of a robbery of a wealthy Miami Beach resident, Olive Wofford. In May, 1968, prior to the trial on charges stemming from this incident, Petitioner was arrested and indicted for the double murder of Terry Rae Kent Frank and Annalie Mohn. The news media referred to these killings as the "Whiskey Creek Murders."

During the pre-trial proceedings in the Wofford robbery case, substantial attention was devoted by the media to a controversial ruling by the trial judge regarding Petitioner's competency to stand trial. Subsequently, the charges in the Wofford robbery case were nolle prossed so that the trial in Broward County on the Whiskey Creek Murders could commence. Then on August 14, 1968, Petitioner and three others were indicted by a United States Grand Jury for conspiring to transport stolen securities in interstate commerce. Those charges were closely related to the Whiskey Creek case. On March 1, 1969, Petitioner was found guilty of the murder of Terry Rae Kent Frank. On August 25, 1969, charges in the Wofford robbery case were refiled. In December of the same year, Murphy pled guilty to one count of the federal indictment.

In July of 1970, pre-trial proceedings in the Wofford case began. Petitioner filed a motion for change of venue based on allegedly prejudicial pre-trial publicity. The trial court deferred ruling on this motion until voir dire of the jury panel was completed. On July 27, 1970, the voir dire commenced. It was completed on August 10, 1970. Eventually, Murphy's plea of insanity was rejected and he was convicted and sentenced to serve a term of life imprisonment for the crime of breaking and entering a dwelling with intent to commit robbery being then and there armed and/or assaulting persons therein. He was also sentenced to serve a term of twenty years, consecutive to the first term imposed, for the crime of assault with the intent to commit robbery.

Initially, Murphy contends that the failure to change venue

[1] Murphy's first Petition was dismissed by this Court for failure to exhaust state remedies. Order of Dismissal, Murphy v. Wainwright, 72-1392-Civ-CA (December 7, 1972).

constituted a denial of due process. Petitioner asserts that the publicity surrounding the Wofford robbery and his notoriety attributable to the "Star of India" theft and "Whiskey Creek Murders" negatived any chance for a fair trial that he might otherwise have had in Dade County.

At the outset, it is important to recognize that a trial judge has broad discretion in determining the proper course of action when allegations of prejudicial pre-trial publicity are made. United States v. Collins, 5th Cir. 1972, ____ F.2d ____ [January 24, 1973; No. 72-2063]. Yet that discretion is not unbridled. The Supreme Court has mandated that the federal courts exercise "the duty to make an independent evaluation of the circumstances" surrounding a claim of prejudicial pre-trial publicity. Sheppard v. Maxwell, 384 U.S. 333, 362 (1966). Nevertheless, Petitioner must sustain the burden of showing that his conviction was a result of "essential unfairness. . . not as a matter of speculation but as a demonstrable reality." Adams v. United States ex rel McCann, 317 U.S. 269, 281 (1942).

The Court is sensitive to the delicate balance that must be struck as a result of the pervasiveness of modern communications and the need to insure a fair trial for the accused. The dilemma facing the courts today and the approach that must be taken pursuant thereto were set forth by the United States Court of Appeals for the Second Circuit in United States v. Agueci, 310 F.2d 817, 832 (1962):

> The typical jury, in this age of mass communications, is not hermetically sealed from the events occurring all about them. Of course, an effort must be made by the trial judge to caution jurors against considering extra-judicial statements pertinent to the guilt or innocence of the individuals upon whom they sit in judgment. Where the cautionary instructions are adequate, as they were here, and where the news reporting was merely routine and hardly inflammatory, the trial judge does not abuse his discretion by refusing to declare a mistrial: "Trial by newspaper may be unfortunate, but it is not new and, unless the court accepts the standard judicial hypothesis that cautioning instructions are effective, criminal trials in the large metropolitan centers may well prove impossible." (citations omitted)

Built into our system are numerous procedures by which the effects of prejudicial pre-trial publicity may be uncovered and eliminated. Chief among these are the granting of a continuance or change of venue and the conducting of an extensive voir dire of prospective jurors.

The trial judge properly deferred ruling on the motion for a change of venue in the case sub judice until he had an opportunity to see the results of the voir dire of the jury panel, which was conducted by counsel. See Hoffa v. Gray, 323 F.2d 178, 180 (6th Cir. 1963), cert. denied 375 U.S. 907. The trial court's action was reasonable in light of the fact that the publicity surrounding Petitioner's exploits had, to a great extent, subsided by July of 1970. Moreover, the judge would have no reason to believe that Murphy, who was known statewide, if not nationwide, would not have as good an opportunity to receive a fair trial in Dade County as he would have anywhere else in Florida. In any event, an extensive voir dire would stand as the primary safeguard against the erosion of Petitioner's right to a fair trial because of the existence of allegedly prejudicial pre-trial publicity.

Petitioner contends, however, that the results of the voir dire of the panel necessitated the granting of his motion to change venue. A thorough review of the record of the voir dire reflects the following disposition of the panel. Of the seventy-eight jurors questioned, twelve were excused peremptorily by the Petitioner; twenty-seven were excused for medical, family or economic reasons; three were excused for miscellaneous reasons; twenty were excused because they had formed an opinion that Petitioner was guilty and they could not give the Petitioner a fair trial; eight prospective jurors were peremptorily excused by the State. Eight jurors were selected to serve at the trial--six regular and two alternates.

Of the eight selected, five had read or heard about the facts surrounding the Wofford robbery through the media, from discussions with friends and neighbors, or through discussions with other prospective jurors. Each of the eight selected jurors knew that the Petitioner had previously been convicted in either the Star of India theft or the Whiskey Creek murders.

The crucial issue before this Court is whether either knowledge of the facts surrounding the Wofford robbery or knowledge of the Petitioner's prior felony convictions was sufficient to render these jurors impartial in light of their assurances to the court that they would reach a verdict based solely on the evidence introduced at trial.[2] The Supreme Court of the United States, realizing the dilemma faced by the courts in ensuring a fair trial for the accused who has been the target of pre-trial publicity, set forth the test for ascertaining the impartiality of a prospective juror. The Court stated:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any pre-conceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective jurors impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Irvin v. Dowd, 366 U.S. 717, 722-23 (1961).

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[2] Florida law provides as follows:
§913.03 Grounds for Challenge to Individual Jurors for Cause

> 10) The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent him from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he declares and the court determines that he can render an impartial verdict according to the evidence.

Petitioner is in the position of asking this Court to infer that the jurors in this case were biased because they were aware of his prior felony convictions or were familiar with some of the facts and issues involved in the case. The Court hesitates to draw such an inference in light of each juror's protestations of impartiality. Petitioner carries the burden of proving "whether the nature and strength of the opinion formed are such as in law necessarily. . . raise the presumption of partiality. . . . Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside. . . ." Reynolds v. United States, 98 U.S. 145, 156-57 (1878).

The Court is not without some objective criteria by which the jurors' proclamations of impartiality may be measured. If the pre-trial publicity were intensive or extensive or the examination of the entire panel revealed widespread prejudice against the defendant, the Court could, as a matter of law, disregard the jurors' estimation of themselves. Beck v. Washington, 369 U.S. 541 (1962). After careful consideration of the record, the Court concludes that no such widespread prejudice against the Petitioner was harbored by the jury panel. Furthermore, the publicity of which Petitioner complains was, as the State appellate court found, largely factual, rather than inflammatory in nature. Also, the dates on the great majority of newpaper clippings and edited television news releases show that they had been published between December 15, 1967 and January 24, 1969. Only five articles have been presented to the Court bearing dates of the period of the jury selection and of these, only one received front-page coverage.

Petitioner's contention that publicity which focused upon him a year and a half to three years prior to trial must be deemed conclusively prejudicial must fail in light of the Supreme Court's

opinion in Beck v. Washington, supra. In Beck, the defendant, a labor union official, was convicted on a charge of embezzlement of union funds. His trial occurred nine and one-half months after he was first called before a highly-publicized Senate Committee and five months after indictment. The publicity that arose at the time of trial was neither intensive nor extensive. Addressing itself to the contention that the defendant was prejudiced by the pretrial publicity, the Court stated:

> Although most of the persons thus selected for the trial jury had been exposed to some of the publicity related above, each indicated that he was not biased, that he had formed no opinion as to petitioner's guilt which would require evidence to remove, and that he would enter the trial with an open mind disregarding anything he had read on the case. 369 U.S. at 557.

The passage of time is a crucial factor in determining the effects of the pre-trial publicity on a jury panel. In fact, the Court finds that each of the five jurors who had some knowledge of the facts of the Wofford robbery possessed only a vague recollection of the facts. The cases relied upon by Petitioner, Pamplin v. Macon, 364 F.2d 1 (5th Cir. 1966); United States ex rel Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1963); Sheppard v. Maxwell, supra; and Irvin v. Dowd, supra are inapposite. Those cases present situations factually distinct from the case sub judice.

The issue of whether each juror who possessed knowledge of Murphy's previous felony convictions should have been excluded from service for cause is more troublesome. Those convictions were inadmissible at trial since Murphy did not take the stand.[3] The Court finds, however, that Petitioners' reliance on Marshall v. United States, 360 U.S. 310 (1959) is misplaced. In Marshall

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[3] Fla. R. Evid. 99.

the defendant was charged with unlawfully dispensing drugs without a prescription in violation of 21 U.S.C. §353(b)(1)(B). The defendant did not take the stand but he did raise the issue of entrapment. Seeking to rebut this issue, the Government proferred proof that petitioner had previously practiced medicine without a license. The trial judge refused this offer on the grounds of relevance and prejudice. During the trial, though, two newspaper articles, which reflected petitioner's past felony convictions and admissions to having previously dispensed drugs without a license, were read by seven jurors. Despite the fact that the trial judge subsequently subjected each juror to intensive voir dire to insure that his impartiality was not compromised, the Supreme Court reversed the conviction. In so doing, however, the Court stressed that the action was taken pursuant to its inherent supervisory powers only. Marshall, supra at 313. The Court refrained from analyzing the issue in terms of due process standards.

It is axiomatic that a federal district court will not sit as an appellate court to review the wisdom of state court procedures or to review all errors that may be claimed to have been committed in the course of state criminal trial. The concept of federalism dictates that federal courts overturn a state conviction only where specific constitutional protections have been impugned or where circumstances amounting to a denial of fundamental fairness exist. Colbroth v. Wainwright, 466 F.2d 1193 (5th Cir. 1972) Flanagan v. Beto, 437 F.2d 895 (5th Cir. 1971). The relationship between the federal supervisory power, which underlies the Marshall opinion, and the commands of due process was set forth by the Supreme Court in McNabb v. United States, 318 U.S. 332 (1943). The Court stated:

> For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice," Herbert v. Louisiana, 272 U.S. 312 (1926), which are secured by the Fourteenth Amendment, the scope of our reviewing

power over convictions brought here from the Federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our Federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the Federal criminal law in the Federal courts. 318 U.S. 340-41.

Although the situation in Marshall is factually similar to the instant case, the rationale of that opinion militates against Petitioner's position. This Court, then, finds that a trial by jurors, each of whom has obtained knowledge of a defendant's past felony convictions through pre-trial publicity does not, in light of the Supreme Court's refusal to so find, rise to Constitutional proportions when each juror has satisfied the impartiality requirements set forth in Irvin v. Dowd, supra. The Court recognizes that the distinction between acts or occurrences which warrant the exercise of federal supervisory powers and those which reflect a denial of due process is often a nebulous one. Nevertheless, the dictates of federalism compel this Court to abide by that distinction whenever it exists. Petitioner's claim regarding the effects of pre-trial publicity must fall.

Similarly, Petitioner's argument that the trial court committed reversible error in denying his motion to bifurcate the trial on the issues of guilt and sanity must fail in light of the nature of this review. A separate trial on the

issue of insanity[4] is not required by the Constitution and a state or court may validly consider its purposes better served by resolution of the issues of guilt and sanity in a single trial. See, McGautha v. California, 402 U.S. 183 (1971), and Spencer v. Texas, 385 U.S. 554 (1967).

Accordingly, it is ordered and adjudged that the Petition for Habeas Corpus is hereby denied.

DONE AND ORDERED at Miami, Florida this 27th day of August, 1973.

E. Clyde Atkins
United States District Judge

4 Under Florida procedure, the defendant is not entitled of right to a separate trial on the issue of insanity. Williams v. State, 100 Fla 814, 130 So. 456 (1930).

Supreme Court, U. S.
FILED
FEB 6 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

TERM, 1974

No. 74-5116

JACK ROLAND MURPHY,

Petitioner,

—vs—

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 12, 1974
CERTIORARI GRANTED DECEMBER 23, 1974

Supreme Court of the United States

TERM, 1974

No. 74-5116

JACK ROLAND MURPHY,

Petitioner,

—VS—

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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DOCKET ENTRIES

DATE	PROCEEDINGS
1968	
1-28	Information in case No. 68-530 filed against the Petitioner.
2-1	Motion for Change of Venue filed in Case No. 68-530.
9-5	State Attorney Nolle Prossed Case No. 68-530.
1969	
8-25	Filing Information in Case No. 69-7464 against Petitioner. (Refining of Charges in prior case No. 68-530).
1970	
7-17	Motion for Change of Venue filed.
7-27	Jury Selection began.
8-10	Introduction of Exhibits in Support of Motion to Change Venue.
8-10	Motion for Change of Venue denied.
8-17	Jury Selected and Sworn. Trial commenced.
8-21	Jury returned Verdict of Guilty on all counts.
8-24	Defendant Sentenced by Trial Court.
9-23	Notice of Appeal to the District Court of Appeals of Florida, Third District, filed.
1971	
9-21	Opinion of the District Court of Appeals of Florida, Third District, Affirming the Conviction.
1972	
8-31	Petition for Writ of Habeas Corpus filed. Case No. 72-1392.
12-7	Order of Dismissal Without Prejudice filed by the United States District Court Southern District of Florida.

DATE	PROCEEDINGS
1973	
1-29	Petition for Writ of Habeas Corpus and Composit Exhibits A-D Case No. 73-151.
2-6	Order to Show Cause. Respondent to file a memorandum of law to show cause why petition should not be granted.
8-29	Order of United States District Court, Southern District of Florida, Denying Petition for Writ of Habeas Corpus. (8-27-73) Case No. 73-151.
9-11	Application for Certificate of Probable Cause.
9-17	Motion for Leave to Appeal in Forma Pauperis.
9-21	Notice of Appeal from the Judgment and Order of the Court Denying the Petition for Writ of Habeas Corpus in Case No. 73-151.
9-24	Order: Petition for Issuance of Certificate of Probable Cause to Appeal (with leave to appeal in forma pauperis) is granted.
11-18	Amended Order—Motion to Amend Order of 8-29-73.
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6-10	Opinion of the United States Court of Appeals for the Fifth Circuit.
6-24	Petition for Rehearing and suggestion for Petition for rehearing En Banc.
7-12	Order Denying Petition for rehearing and for rehearing En Banc.
8-12	Motion for leave to proceed in forma pauperis and petition for writ of certiorari docketed in the United States Supreme Court.
12-23	Motion for Leave to proceed in forma pauperis granted, and petition for writ of certiorari granted.

PETITION FOR WRIT OF HABEAS CORPUS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PERSONS IN STATE CUSTODY

No. 73-151-Civ-PF

[Filed Jan. 29, 2:29 p.m., '73, Joseph I. Bogart, Clerk, U. S. Dist. Ct., Southern Dist. of Fla., Miami, Fla.]

JACK ROLAND MURPHY, A-024627
Full name and prison number (if any) of Petitioner

—*vs*—

STATE OF FLORIDA

Name of Respondent

Instructions

(Read Carefully—Must be filed in Triplicate)

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or add an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath, any false statement of material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.

If the petition is taken *in forma pauperis*, it shall

include an affidavit (attached at the back of this form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, *the original and both copies* shall be mailed to: Clerk, United States District Court, Southern District of Florida, P.O. Box 669, Miami, Florida.

1. Place of detention Raiford State Prison
2. Name and location of court which imposed sentence Criminal Court
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
   (a) 69-7464
   (b) _____
   (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
   (a) August 24, 1970, life plus twenty years
   (b) _____
   (c) _____
5. Check whether a finding of guilty was made
   (a) after a plea of guilty _____
   (b) after a plea of not guilty X
   (c) after a plea of nolo contendere _____
6. If you were found guilty after a plea of not guilty, check whether that finding was made by
   (a) a jury X
   (b) a judge without a jury _____
7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes
8. If you answered "yes" to (7), list

(a) the name of each court to which you appealed:
   i. District Court of Appeal of Florida—Third District
   ii. _____
   iii. _____

(b) the result in each such court to which you appealed:
   i. Conviction affirmed
   ii. _____
   iii. _____

(c) the date of each such result:
   i. September 21, 1971
   ii. _____
   iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:
   i. 252 So.2d 385 (Fla. App. 1971)
   ii. _____
   iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:
   (a) _____
   (b) _____
   (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: SEE ATTACHED SHEETS
   (a) _____
   (b) _____
   (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):
SEE ATTACHED SHEETS

(a) _____

(b) _____

(c) _____

12. Prior to this petition for you filed with respect to this conviction

(a) any petition in a State of Florida court under the provisions of Criminal procedure Rule 1 of the Florida Supreme Court? No

(b) any petitions in State or Federal courts for habeas corpus? Yes

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application

(a) the specific nature thereof:

i. Writ of Habeas Corpus

ii. _____

iii. _____

iv. _____

(b) the name and location of the court in which each was filed:

i. United States District Court, Southern District of Florida

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. Dismissed without prejudice

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. December 7, 1972

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. None (copy of Order affixed hereto)

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? Yes

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

i. All grounds presented in previous petition which was dismissed without prejudice

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? Yes

(b) your trial if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. Jack R. Nageley and Harvey S. Swickle, 420 Lincoln Road, Miami Beach, Florida 33139 (at all proceedings)

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. At all proceedings

ii. _____

iii. _____

19. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? Yes

/s/ Jack R. Nageley
Signature of Petitioner

)
) ss
)

Jack R. Nageley, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ Jack R. Nageley
Signature of Affiant

SUBSCRIBED and SWORN to before me this 29th day of January, 1973.

(month) (year)

/s/ Karen B. Schneider
Notary Public

My commission expires:

_____
(month, day, year)

Forma Pauperis Affidavit

(see instructions, page 1 of this form)

I, the undersigned petitioner, hereby certify (or declare) under penalty of perjury that the following facts are true:

(1) I am the named petitioner in the foregoing proceedings.

(2) I represent to the Court that the sum total of funds now on deposit with the prison authorities in my name is $50.00, and I am entirely without any other financial resources with which to pay the statutory fee or costs of these proceedings.

/s/ Jack Roland Murphy
Signature of Petitioner

)
) ss
)

JACK ROLAND MURPHY, being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ Jack Roland Murphy
Signature of Affiant

SUBSCRIBED and SWORN to before me this 18th day of January, 1973.

(month) (year)

/s/ [Illegible]

Notary Public, State of Florida at Large
My commission expires June 1, 1976
Bonded by Interstate Fire Ins. Co.

(month, day, year)

10. GROUNDS ON WHICH CUSTODY UNLAWFUL

1. The petitioner was denied due process and equal protection of law by the trial Court's failure to grant petitioner's Motion for Change of Venue in light of the overwhelming prejudicial publicity about the case as well as the continued publicity concerning petitioner's past criminal exploits.

2. The Petitioner was denied due process and equal protection of law by the trial Court's continued failure to grant petitioner's challenge for cause against those jurors who knew from the various and continued news reports that the defendant was a convicted felon.

3. The petitioner was denied due process and equal protection of the law by the trial Court's failure to grant petitioner's pre-trial motion for a Bifurcated or Separate Jury Trial on the issues of Guilty and Sanity in that by failing to grant said motion, the Court violated petitioner's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution.

11. FACTS WHICH SUPPORT GROUNDS SET OUT IN (10)

INTRODUCTION

The facts in support of the grounds are set forth herein. The history of this case and other collateral matters are set forth in greater detail in the memorandum of law attached to this petition.

FACTS

As to Point (1):

On August 25, 1969, the State filed a two count Information against the defendant for (1) Breaking and Entering a Dwelling with Intent to commit a Felony to-wit: Robbery, and (2) Robbery.

Prior to the trial, defendant filed a Motion for Change of Venue. Affixed to said Motion were a number of exhibits which set forth the continuous barrage of publicity

concerning the case at bar, as well as petitioner's involvement in the "Whisky Creek Murder Case" and his past criminal life. There were also articles concerning Judge Stedman's earlier ruling on petitioner's incompetency to stand trial and the various investigations conducted by Robert Shevin and Governor Kirk.

At the time of argument on the Motion, prior to the trial, the petitioner also offered into evidence the Motion for Change of Venue and exhibits filed in the original case which was nolle processed by the State to-wit: Case No. 68-530.

After argument the Court deferred ruling on the Motion pending the outcome of the jury selection.

Counsel for both sides examined seventy-eight prospective jurors before a jury of six persons and two alternates were picked, none of whom were acceptable to petitioner. Jury selection began on July 27, 1970, and continued until August 10, 1970. Jury selection was confined to the morning hours of each day from 10:00 A.M. until 1:00 P.M. because the Trial Judge was in the process of trying the Charles Celona case in the afternoon.

Of the seventy-eight jurors questioned, petitioner excused twelve peremptorily, twenty-seven were excused for either medical, family or economic reasons; three were excusd on various grounds; and twenty were excused for cause because they had formed an opinion via the news media, that petitioner was guilty. The State excused eight jurors.

Of the six regular and two alternate jurors selected, their knowledge of the petitioner's background, petitioner and the case at bar is as follows:

(a) Five of the eight jurors stated that the jury panel had been discussing the petitioner and the case and many had formed an opinion that defendant was guilty.

(b) Six of the eight jurors knew that petitioner was a defendant in the "Whiskey Creek Murder Case" and was found guilty.

(c) Six of the eight jurors knew that petitioner was a defendant in the theft of the "Star of India" and "Delong Ruby".

(d) All of the jurors knew that defendant was a convicted felon and was serving time for murder or had served time for being involved in jewel thefts.

(e) All the jurors stated that their knowledge of the defendant came from various parts of the new media i.e., radio, television, newspapers, etc.

(f) Four of the eight jurors testified that they had been reading the various articles in the newspapers printed during the week of jury selection.

(g) Four of the eight jurors were familiar with the prior rulings of the Court concerning petitioner's competency to stand trial.

After the jury was selected but prior to them being sworn, petitioner renewed his Motion for Change of Venue on the basis that the jurors, although they gave assurance of being impartial, could not do so because of their knowledge of petitioner's past criminal conduct and convictions.

During this part of the argument, petitioner introduced the following exhibits into evidence in support of the Motion.

1. Petitioner's exhibit (F) which was an Order dated July 8, 1968 removing the trial of the co-defendants to another county because of the Court's failure to control publicity surrounding the case.

2. Petitioner's exhibit (G) which was a hearing on Motion to Change Venue in the United States District Court Southern District of Florida Case No. 68-360 dated March 6, 1969.

3. Petitioner's exhibit (H) entitled Order of Transfer wherein the United States District Court transferred Case Number 68-360 to Pensacola, Florida for trial dated April 21, 1970.

Notwithstanding all of the exhibits and the difficulty in selecting an impartial jury, the Court denied the Motion to change venue.

As to Point (2):

During the course of jury selection, the defendant moved to excuse for cause all those jurors who knew that petitioner had been convicted of a crime, especially those

who knew about the "Whiskey Creek" murder conviction and the conviction for the theft of the Delong Ruby.

Of the eight jurors selected to hear the case, all eight knew that petitioner was a convicted felon and presently serving time for murder or had served time for being involved in jewel thefts.

As to each of those jurors, petitioner moved to have them excused for cause. The Court denied the motion knowing full well that petitioner would not testify at the trial and that the State could not introduce the petitioner's prior record during the trial.

As to Point (3):

Prior to the trial, petitioner moved to have the Court Order a Bifurcated or Separate Jury Trial on the issues of Guilt and Sanity which motion the Court denied. The basis of said motion rests in the fact that petitioner wished to offer testimony as to his sanity but was prohibited from doing so because by so testifying, he would have incriminated himself as to the issue of guilty.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 72-1392-CIV-CA

[Filed Dec. 4, 5:08 p.m., '72, Joseph I. Bogart, Clerk, U. S. Dist. Ct., Southern Dist. of Fla., Miami, Fla.]

JACK ROLAND MURPHY

v.

LOUIE L. WAINWRIGHT

ORDER OF DISMISSAL

Petitioner, Jack Roland Murphy has filed this writ of habeas corpus arising from his conviction in the Dade County, Florida Criminal Court of Record. Petitioner was sentenced to serve a life sentence for the crime of breaking and entering with intent to commit a felony.

Murphy took a direct appeal to the Third District Court of Appeals for Florida and this court affirmed the lower court conviction of the petitioner.

In his direct appeal the petitioner set forth five grounds for his appeal, but the fourth ground set forth in this petition was never presented to the state courts; that ground being:

> "4. The petitioner was denied due process and equal protection of the law by the trial Court's deliberate attempt to prejudice the defendant and secure a conviction against him solely because said Judge was in the middle of an election campaign. That the rulings, dealing with selection of the jury, the issues of insanity and the Court's deliberate attempt to delay the trial so that the State may locate witnesses clearly establishes the attitude of the Court towards the petitioner."

In the case of *Harrison* v. *Wainwright*, 424 F.2d 633 (5th Cir. 1970); the court reaffirmed its holdings in many previous cases when it said:

"Although appellant has exhausted his state remedies as to the other issues offered in his petition, rules of comity dictate that state remedies be exhausted as to all issues raised in a petition for habeas corpus to a federal court. 28 U.S.C. 2254; *Wheeler* v. *Beto*, 5th Cir. 1969, 407 F.2d 816.

For these reasons it is hereby

ORDERED AND ADJUDGED that this petition be dismissed without prejudice in order to afford the petitioner an opportunity to exhaust his available state remedies as to all issues.

DONE AND ORDERED at Miami, Florida, this 7th day of December, 1972.

/s/ [Illegible]
United States District Judge

cc: Jack Roland Murphy
Attorney General State of Florida

PETITIONER'S COMPOSIT EXHIBIT A

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

Case No. 68-530

THE STATE OF FLORIDA

—*vs*—

JACK MURPHY, ET AL., DEFENDANTS

MOTION FOR CHANGE OF VENUE

Pursuant to Rule 1.240 of the Florida Rules of Criminal Procedure, the Defendant, JACK MURPHY, moves the entry of an Order transferring this cause to another county, on the ground that there exists within Dade County such great prejudice that Defendant cannot obtain a fair and impartial trial in this County.

In support of his motion, Defendant submits his own affidavit and the affidavits of 6 residents of Dade County. Also appended to this motion are the exhibits to which reference will be made in the affidavits.

The enormous amount of adverse and prejudicial publicity with regard to the alleged crimes is shown by Defendant's affidavit, and it represents only a part of the continuing newspaper, television and radio publicity prevalent in the Dade County area. This barrage of adverse and prejudicial material has so incited the public that should this case be tried in Dade County it would be extremely difficult, if not impossible, to obtain an impartial jury.

It will also be shown that within the past three months, the defendant has been the victim of a barrage of prejudicial publicity attempting to connect him with other crimes. This publicity of and by itself has so prejudiced the citizenry of Dade County against the defendant that it would be impossible to obtain a fair trial, not only

in the case now before the Court, but in any case in which the defendant may be an accused.

The exhibits attached to this motion are not by any means intended to be a complete list of the items of this unfavorable publicity and, of course, do not fully depict the full measure of the biased publicity directed against the defendant. If this showing does not satisfy the Court, the defendant requests an opportunity to present additional exhibits and testimony to more fully inform the Court as to the prior history of similar attacks, a more complete picture of the situation now existing, and the nature of additional publicity which might be expected prior to the beginning of the trial of this cause and its completion.

WHEREFORE, the Defendant moves for the entry of an Order as aforesaid.

Respectfully submitted,

HARVEY ST. JEAN & JACK R. NAGELEY
Attorneys for Defendant
420 Lincoln Road
Miami Beach, Florida 33139

/s/ Jack R. Nageley
Of Counsel

CERTIFICATE OF GOOD FAITH

WE, HARVEY ST. JEAN and JACK R. NAGELEY, attorneys for the defendant, JACK MURPHY, hereby certify that the foregoing Motion for Change of Venue is made in good faith for the purpose of providing to the defendant a fair trial by an unbiased jury and is not made for the purpose of delay.

/s/ Harvey St. Jean
HARVEY ST. JEAN

/s/ Jack R. Nageley
JACK R. NAGELEY

I HEREBY CERTIFY that a true copy of the foregoing Motion for Change of Venue was Hand Delivered to HON. RICHARD E. GERSTEIN, State Attorney, 1351 N.W. 12th Street, Miami, Florida this 1st day of February, 1968.

/s/ Jack R. Nageley
Of Counsel

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

Case No. 68-

THE STATE OF FLORIDA

—*vs*—

JACK MURPHY, ET AL., DEFENDANTS

AFFIDAVIT

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

BEFORE ME, the undersigned authority, duly authorized to administer oaths and take acknowledgements, personally appeared JACK MURPHY, who, after being duly sworn by me, on his oath, deposes and says:

1. Defense counsel has collected clippings from newspapers circulated in Dade County, Florida for the period from January 29, 1968 through January 31, 1968.

These newspaper clippings discuss the facts of the within cause. They also contain pictures of the evidence that the state will attempt to introduce at trial. Copies of these clippings are attached to this motion and bear reference numbers one through twelve.

(a) Numbers one through five are clippings taken from the Miami Herald, City Edition. Said paper has a daily circulation of 239,000 within Dade County.

(b) Numbers six through nine are clippings taken from the Miami News. Said paper has a daily circulation of 87,000 within Dade County.

(c) Numbers ten through twelve are clippings taken from the Miami Beach Daily Sun. Said paper has a daily circulation of 87,000 within Dade County.

2. Defense counsel has also collected television news broadcasts from three local television stations. These broadcasts have been heard in Dade County for the

period from January 28, 1968 through January 31, 1968. Copies of the pertinent portions of these broadcasts are appended to this motion and bear reference numbers thirteen through twenty-nine.

(a) Numbers thirteen through sixteen are WTVJ-Channel 4 news broadcasts. During the course of these broadcasts films of the crime scene and the defendant were shown.

(b) Numbers fourteen through twenty-five are WCKT Channel 7 news broadcasts. These broadcasts began Sunday, January 28, 1968 and have run continuously until the filing of this motion. Films of the defendant and crime scene were also shown.

(c) Numbers twenty-six through twenty-nine are WLBW Channel 10 news broadcasts. Films of the defendant and the crime scene also accompanied these broadcasts.

3. The news broadcasts have discussed pertinent facts of this case which may or may not be admissable in a trial of this cause. The films shown during these broadcasts are prejudicial in that they show the alleged instrumentalities of the crime. These instrumentalities may or may not be admissible in a criminal prosecution of this case.

4. The exhibits hereto are not presented as a complete collection of all publicity of the case sub judice. Specifically, no attempt has been made to collect any radio news broadcasts. However, the facts of this case have continuously been discussed on all the radio stations serving Dade County.

5. In further support of this motion, defense counsel has collected clippings from the above-mentioned newspapers implicating the defendant as a suspect in the double slaying of Terry Rae Frank and Annelie Mohn. This prejudicial publicity enhances the difficulty in obtaining an unbiased jury in the case sub judice. Copies of these clippings are attached to this motion and bear reference numbers thirty (30) through thirty-four (34). These clippings do not represent a complete collection of all publicity involving the affiant with that case.

Specifically, no attempt has been made to collect television and radio data of the slaying.

Further affiant sayeth not.

/s/ Jack Murphy
JACK MURPHY
Affiant

SWORN TO and SUBSCRIBED before me this 1st day of February, 1968.

/s/ Jack R. Nageley
Notary Public—State of Florida
at large

My commission expires: June 1, 1969

PETITIONER'S COMPOSIT EXHIBIT B

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

Criminal Case No. 125 (Judge Nance)

THE STATE OF FLORIDA

—*vs*—

JACK MURPHY AND JACK GRIFFITH, DEFENDANTS

MOTION FOR CHANGE OF VENUE

Pursuant to Rule 1.240, Florida Rules of Criminal Procedure, defendant, MURPHY, moves the entry of an order transferring this cause to another county, on the ground that there exist within Broward County, Florida, such great prejudice that defendant cannot obtain a fair and impartial trial in Broward County.

In support of his motion, defendant submits his own affidavit, and the affidavits of two residents of Broward County. Also appended to this motion are the exhibits to which reference will be made in the affidavits.

The enormous amount of adverse and prejudicial publicity with regard to the alleged crimes is shown by defendant's affidavit, and it represents only a part of the continuing newspaper, television and radio publicity prevalent in the Broward County area. This barrage of adverse and prejudicial material has so incited the public that should this cause be tried in Broward County, it would be extremely difficult, if not impossible, to obtain an impartial jury.

It will also be shown that the defendant has been the victim of a continuous barrage of prejudicial publicity with regards to another crime. This publicity of and by itself has so prejudiced the citizenry of Broward County against defendant that it would be impossible to obtain a fair trial, not only in the case now before this Court, but in any case in which the defendant may be accused.

The exhibits attached to this motion are not by any means intended to be a complete list of the items of this unfavorable publicity and, of course, do not fully depict the full measure of the biased publicity directed against the defendant.

The exhibits affixed hereto do not cover any of the radio or television publicity which is so voluminous that it is impractical at this time to affix to this motion copies of these news broadcasts. However, at the time of trial, defendant intends to subpoena all of the news broadcasts from each of the respective television and radio stations.

If this showing does not satisfy the court, the defendant requests an opportunity to present additional exhibits and testimony to more fully inform the Court as to the prior history of similar attacks, a more complete picture of the situation now existing, and the nature of additional publicity which might be expected prior to the beginning of the trial of this cause and its completion.

WHEREFORE, defendant moves the entry of an order as aforesaid.

HARVEY ST. JEAN & JACK R. NAGELEY
Attorneys for defendant, MURPHY
420 Lincoln Road, Suite 240
Miami Beach, Florida 33139

By /s/ Jack R. Nageley
Of Counsel

CERTIFICATE OF GOOD FAITH

WE, HARVEY ST. JEAN and JACK R. NAGELEY, Attorneys for the Defendant, JACK MURPHY, hereby certify that the foregoing Motion for Change of Venue is made in good faith for the purposes of providing to the defendant a fair trial by an unbiased jury, and is not made for the purpose of delay.

By /s/ Jack R. Nageley
Of Counsel

WE HEREBY CERTIFY that a true copy of the foregoing Motion for Change of Venue was Hand Delivered to HON. RUSSELL B. CLARKE, State Attorney, Broward County Courthouse, Fort Lauderdale, Florida this 17th day of February, 1969.

By /s/ Jack R. Nageley
Of Counsel

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

Criminal Case No. 125 (Judge Nance)

THE STATE OF FLORIDA

—*vs*—

JACK MURPHY AND JACK GRIFFITH, DEFENDANTS

STATEMENT OF GOOD CAUSE

Pursuant to Rule 1.240, Florida Rules of Criminal Procedure, defendant, MURPHY, by and through undersigned counsel hereby sets forth his statement of good cause why he has not filed his Motion For Change Of Venue within the time set forth under the above cited rule.

1. Rule 1.240, *supra*, Requires that two or more affidavits from persons other than the defendant shall accompany the motion for change of venue.

2. Notwithstanding several attempts, counsel for defendant was unable to obtain the necessary affidavits required by the rule.

3. The affidavits affixed to this motion were obtained from residence of Broward County on Saturday, February 15, 1969.

Based upon the foregoing reasons, defendant MURPHY, respectfully submits that he has shown good cause why he has not filed his motion for change of venue within ten (10) days prior to the trial of this cause.

Respectfully submitted

JACK R. NAGELEY & HARVEY ST. JEAN
Attorneys for Defendant MURPHY
420 Lincoln Road, Suite 240
Miami Beach, Florida 33139

By /s/ Jack R. Nageley
Of Counsel

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

Criminal Case No. 125 (Judge Nance)

THE STATE OF FLORIDA

—*vs*—

JACK MURPHY AND JACK GRIFFITH, DEFENDANTS
AFFIDAVIT

STATE OF FLORIDA)
) ss.
COUNTY OF BROWARD)

BEFORE ME, the undersigned authority, duly authorized to administer oaths and take acknowledgements, personally appeared JACK MURPHY, who after being duly sworn by me, on his oath, deposes and says:

1. Defense counsel has collected clippings from newspapers circulated in Broward County, Florida, for the period from December 9, 1967 through February 7, 1969.

These newspaper clippings discuss the facts of the within cause. They also contain pictures of the evidence that the State will attempt to introduce at trial. Copies of these clippings are attached to this motion and bear reference numbers one through one hundred.

(a) Numbers one through twenty-eight are clippings taken from the Sun Sentinel News. Said paper has a daily circulation of approximately 45,000 in Broward County.

(b) Numbers twenty-nine through sixty-four are clippings from the Fort Lauderdale News. Said paper has a daily circulation of 109,000 within Broward County.

(c) Numbers sixty-five through eighty-five are clippings taken from the Miami Herald. Said paper has a daily circulation of 56,000 within Broward County.

(d) Numbers eighty six through ninety two are clippings taken from the Miami News. Said paper has a daily circulation of 5,000 within Broward County.

2. Defense counsel has not collected television or radio news broadcasts. However, at the time of trial, counsel will subpoena said news broadcasts from each of the respective television and radio stations servicing Broward County.

3. The newspapers and news broadcasts have discussed pertinent facts of this case which may or may not be admissible in the trial of this cause.

4. The exhibits affixed hereto are not presented as a complete collection of all publicity of the case sub judice. Many newspaper articles have not been made a part of this motion but will be submitted at the time of trial if necessary.

5. In further support of this motion, defense counsel has collected clippings from the above-mentioned newspapers implicating the defendant in a robbery of the home of Mrs. Olive Wofford. This prejudicial publicity enhances the difficulty in obtaining an unbiased jury in the case sub judice. Copies of these clippings are attached to this motion and bear reference numbers ninety three through one hundred. These clippings do not represent a complete collection of all publicity involving the affiant with that case. Specifically, no attempt has been made to collect television and radio data of the robbery.

FURTHER AFFIANT SAYETH NOT.

/s/ Jack Murphy
JACK MURPHY
Affiant

SWORN TO AND SUBSCRIBED to before me this 17th day of February, 1969.

/s/ Jack R. Nageley
Notary Public—State of Florida
at large

My commission expires: June 1, 1969

I HEREBY CERTIFY that a true copy of the foregoing Affidavit of Defendant, MURPHY, was Hand Delivered to HON. RUSSELL B. CLARK, State Attorney, Broward County Courthouse, Fort Lauderdale, Florida this 17th day of February, 1969.

HARVEY ST. JEAN & JACK R. NAGELEY
Attorneys for Defendant, MURPHY
420 Lincoln Road, Suite 240
Miami Beach, Florida 33139

By _____
Of Counsel

PETITIONER'S COMPOSIT EXHIBIT C

(Those news articles which appear in Petitioner's Composit Exhibits A and B are not reproduced in this Exhibit)

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

Case No. 69-7464

[Filed July 17, 1970, J. F. McCracken, Clerk]

THE STATE OF FLORIDA, PLAINTIFF

—*vs*—

JACK ROLAND MURPHY, DEFENDANT

MOTION FOR CHANGE OF VENUE

Pursuant to Rule 1.240 of the Florida Rules of Criminal Procedure, the Defendant, JACK MURPHY, moves the entry of an Order transferring this cause to another county, on the ground that there exists within Dade County such great prejudice that Defendant cannot obtain a fair and impartial trial in this County.

1. In support of his motion, Defendant asks this Court to adopt and incorporate into said motion, the prior Motion for Change of Venue and all affidavits and exhibits filed in Case No. 68-530.

2. Also in support of said motion, defendant will submit his own affidavit as soon as it is signed by defendant who is in Raiford Prison.

3. Defendant also asks that this Court adopt and incorporate into this Motion the Order of this Court entered in Case No. 68-530-B&C removing said cause from Dade County dated July 8, 1968.

4. Because of the enormous amount of exhibits reflecting the prejudicial publicity in the above cause, defendant rather than attach said exhibits to this motion, will reserve the right to present said exhibits at the time of the hearing on said motion.

5. The enormous amount of adverse and prejudicial publicity which has saturated Dade County for the past two and one half years has so incited the public that should this case be tried in Dade County, it would be extremely difficult, if not possible, to obtain an impartial jury.

WHEREFORE, the Defendant moves for the entry of an Order as aforesaid.

Respectfully submitted,

JACK R. NAGELEY & HARVEY S. SWICKLE
Attorneys for Defendant
420 Lincoln Road
Miami Beach, Florida 33139

/s/ Harvey S. Swickle
Of Counsel

CERTIFICATE OF GOOD FAITH

I HARVEY S. SWICKLE, attorney for the defendant, JACK MURPHY, hereby certify that the foregoing Motion for Change of Venue is made in good faith for the purpose of providing to the defendant a fair trial by an unbiased jury and is not made for the purpose of delay.

/s/ Harvey S. Swickle
HARVEY S. SWICKLE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Change of Venue was mailed this 17th day of July 1970 to the Honorable Richard E. Gerstein, State Attorney, 1351 N.W. 12th Street, Miami, Florida.

/s/ Harvey S. Swickle
HARVEY S. SWICKLE

DEFENDANT'S MOTION FOR CHANGE OF VENUE

DEFENDANT'S EXHIBIT No F

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

Case Numbered 68-530-B and C

[Filed July 8, 1968, J. F. McCracken, Clerk]

THE STATE OF FLORIDA, PLAINTIFF

versus

ROBERT LAWRENCE GREENWOOD AND
PAUL NICHOLAS GAGNON, DEFENDANTS

ORDER REMOVING CAUSE

IT APPEARING UNTO THE COURT that the above styled and numbered cause is this date set for trial, and it further appearing that the defendants, Greenwood and Gagnon, have been subjected to prejudicial press releases, editorials and general news coverage by the press, television and radio stations over a considerable period of time and it further appearing that the State Attorney of this judicial circuit made certain unprecedented and unwarranted statements immediately before the holiday weekend, and the Court being otherwise fully advised in the premises, it is therefore the

CONCLUSION OF THE COURT that the defendants, Greenwood and Gagon, absolutely cannot receive a fair and impartial trial, as constitutionally guaranteed, in Dade County at the present time or any foreseeable time in the future, therefore the Court further concludes, taking due note of the words of Justice Tom Clark, speaking in the majority opinion in Sheppard vs. Ohio, who said (the trial court) "did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which

saturated the community.", that venue must be changed, therefore, it is

CONSIDERED, ORDERED AND ADJUDGED that the above styled and numbered causes be, and the same are hereby, removed to a court in some other convenient county where a fair and impartial trial can be had, such court and county to be particularized and announced as soon as arrangements can be concluded therefor.

DONE AND ORDERED ex proprio motu at Miami, Dade County, Florida this the 8th day of July, A. D., 1968.

/s/ [Illegible]
Judge

I hereby certify that this instrument is a true and correct copy as shown by files and records in my office. WITNESS MY HAND and official seal this July 14, 1970.

J. F. MCCRACKEN
Clerk, Criminal Court of Record

By /s/ [Illegible]
D.C.

PETITIONER'S COMPOSIT EXHIBIT D

ON MOTION FOR CHANGE OF VENUE

DEFENDANT'S EXHIBIT G

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
SOURTHERN DISTRICT OF FLORIDA

No. 68-360-Cr-JE

[Filed Aug. 10, 1970]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ALLAN DALE KUHN, JACK ROLAND MURPHY,
JACK GRIFFITH, AND ROBERT GREENWOOD, DEFENDANTS

March 6, 1969
Miami, Florida
Judge JOE EATON

MOTION FOR CHANGE OF VENUE

EXCERPT OF TESTIMONY

APPEARANCES:

JACK V. ESKENAZI, and
NEAL R. SONNETT,
Assistant United States Attorney

On behalf of Plaintiff

JACK R. NAGELEY, ESQ.
On behalf of Defendants Kuhn and Murphy

DAVID RUSSELL, ESQ.
On behalf of Defendant Griffith

MILTON GRUSMARK, ESQ.
On behalf of Defendant Greenwood

[2] • • • •

THE COURT: Let me make an expression here which might not be very professional, but it is certainly true. I do not believe there has ever been a situation, there has not been one in my experience in the law, parallelling this one, where we are trying to try a case in a week or ten days, following a case involving the same subject matter, in the same area, with this notoriety. It just does not happen very often, and then with another one coming up, a third one, involving the same general subject matter, in the same matter.

I am forgetting the question of prejudice and being very practical about it. I do think that presently all of the voir dire by the Judge to a juror—it is going to have to be separate and apart from all other jurors. We are going to have to have about 500 jurors and we are going to have to voir dire each one out of the presence of the others. I think if we tried to do that next week, that we would spend a week on voir dire and never conceivably get a jury.

Speaking of the time in Court, I have [3] five other criminal cases I could be trying while we are asking these folks if they know anything about Murph the Surf, because I am telling you, they do.

People in this County can tell you who Murphy is, who would not have the slightest idea who Earl Faircloth is, and I think that is a fair statement. I am not talking about any prejudicial newspaper coverage at all. It may be that because Mr. Murphy has simply sort of, somehow or another, become pretty good publicity; but the point is, considering for a moment every count in every trial which was ever had was entirely fair, this man is simply too widely known, and so is Griffith and Kuhn, to some degree. Greenwood to some lesser degree. I believe he has only been in one case, that is what the motion stated; but honestly, I can see us just simply spending a week going through what we know to be good procedure, establishing a record to say that we cannot try this case this week.

It is simply foolhardy to come down here asking folks if they know anything about Mr. Murphy, because just as a matter of interest, we are here now at the noon hour,

and we are being a [4] little informal, I went over between Punta Gorda and Arcadia last weekend, halfway up the Peace River in the woods, and I mean really in the woods, and an old gentleman that used to be a fishing guide came up there in his boat, and I had not run into anybody up there in the last three times I have been there, that is how wild it is; but he says, "Hey, Judge, did you hear about Murph the Surf?"

As a matter of fact, I had not, because I had been traveling to get there when the jury was out that night, and this was early the next morning. He said, "Old Murph got his."

I am telling you, this fellow is a retired fishing guide from Nocatee, Florida, and that is what was on his mind. I am not trying to be funny about it, but it is perfectly obvious, for weeks after the matter with Judge Stedman, his ruling, I could not go to a social event, I would want to sit down and talk about the Dolphins, but everybody there wanted to ask me about Murph the Surf. It was just the topic of conversation.

So, not being very professional about it but being very practical about it, I agree with the [5] Government and the defense, that we cannot try these cases back to back and possibly get a jury, and it is useless to go through the routine to try to show we tried, when it would take a week away from other criminal cases.

The only question is, do we send it out, and the ruling is this: Number one, Mr. Grusmark motion to sever, which I am not hearing today, not because of the late filing, but because of the practical matter, as it does not matter, Mr. Grusmark, but I am not going to transfer the cases out, change the venue now. We are going to simply understand we are not going to try the case, or try to get a jury next week. We are going to grant Mr. Russell's motion for continuance.

The cases have not been severed so that, in effect, continues the trial. Ruling Number One, the motion for continuance is granted.

I am going to decide on what the next step should be when this Court learns what the State Attorney of Broward County does in reference to his second proposition, because this is done in the interest, simply, of cooperation.

[6] We then will be in a position to reasonably determine whether there ought to be a continuance, or whether the continuance would be necessarily of such duration as to require a change of venue. For all practical purposes, and this is not criticism of the press coverage at all, these people are simply too widely known to get an impartial jury at the moment.

MR. RUSSELL: If it please your Honor, I would also like to inform the Court that I have not gotten around to it, due to other matters, but I also intend to file a motion, if it makes any difference to your decision, for a separate trial from Murphy.

I have been that route once, and I did not find it to be conducive to the fairest trial, for the defendant Griffith, and I will move within a very short time for a separate trial.

THE COURT: When that time comes, we will entertain Mr. Grusmark's motion and any other motions that may have been pending.

So we close with the idea that we are only going to set this matter over for a reasonable [7] period of time, and I do not mean a long period of time; but we are not going to set the trial date immediately.

We are going to make this decision as to length of continuance as compared to change of venue on the basis of information which will accumulate in the next sixty days or so, and then we will be in a better position to make a ruling which is fair to everybody concerned. That means that the ruling on the motion for change of venue is reserved.

This means, gentlemen, that there being a pending motion, I may even be in a position to enter an order sometime without any further argument. I do not suggest that I will do that, but the point is, we have granted a motion for continuance filed on behalf of Griffith, a ruling reserved on all motions for change of venue, and that is the only order that we will need, I believe, Mr. Sonnett.

(Thereupon the hearing was concluded.)

[8]

CERTIFICATE

STATE OF FLORIDA)
) ss:
COUNTY OF DADE)

I, LEONARD W. KLEIN, Official Court Reporter, do hereby certify that the foregoing transcript, pages 1 to 7, inclusive, is a true and correct transcription of my shorthand notes as taken by me at the hearing in the foregoing cause at the time and place aforesaid.

DATED, at Miami, Florida, this 4th day of April, 1969.

/s/ Leonard E. Klein
Official Court Reporter

DEFENDANTS EXHIBIT No. H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 68-360-Cr-JE

[Filed Apr. 22, 10:34 a.m., '70, Joseph I. Bogart, Clerk, U.S. Dist. Ct., Southern Dist. of Fla.]

UNITED STATES OF AMERICA

—*v*—

ALLAN DALE KUHN, JACK ROLAND MURPHY, a/k/a "Murph the Surf," JACK A. GRIFFITH, and ROBERT GREENWOOD, a/k/a Bobby Greenwood, DEFENDANTS

ORDER OF TRANSFER

Defendants' motion for change of venue having been granted in open Court, it is

ORDERED that the above-styled cause is hereby transferred to the Northern District of Florida, Pensacola Division, for trial before the undersigned judge. It is further

ORDERED that this cause is set for trial on Monday, May 11, 1970, at 9:30 a.m. at the United States Post Office and Court House Building, 100 North Palafax Street, Pensacola, Florida.

DONE AND ORDERED at Miami, Southern District of Florida, this 21 day of April, 1970.

/s/ Joe Eaton
United States District Judge

cc: United States Attorney
Milton E. Grusmark, Esquire
Jack R. Nageley, Esquire
David A. Russell, Esquire

[Filed Aug. 29, 1973, Joseph I. Bogart, Clerk, U.S. Dist. Ct. Southern Dist. of Fla., Miami Fla.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 73-151-Civ-CA

JACK ROLAND MURPHY, PETITIONER,

v.

THE STATE OF FLORIDA, RESPONDENT.

ORDER DENYING PETITION FOR HABEAS CORPUS

Petitioner, Jack Roland Murphy, is before the Court upon filing of his second Petition for Writ of Habeas Corpus.[1] In the instant petition, Murphy contends that his confinement, which stems from a 1970 conviction in Dade County Criminal Court, is unlawful in that (1) the trial court erred by denying his motion for a change of venue in light of allegedly prejudicial pre-trial publicity; (2) the trial court failed to dismiss for cause those jurors who knew that Petitioner was a convicted felon; (3) the trial court committed reversible error in denying Petitioner's motion to bifurcate the trial on the issues of guilt and sanity.

To fully appreciate the issues raised by Petitioner, it is necessary to set forth much of his notorious background. Prior to his involvement in the crime which is the subject of this petition, Murphy had focused nationwide attention on himself for his role in the 1964 theft of the "Star of India" sapphire from the New York Museum of Natural History. As a result of that enterprise and because of certain physical characteristics, Murphy was popularly referred to as "Murph the Surf."

[1] Murphy's first Petition was dismissed by this Court for failure to exhaust state remedies. Order of Dismissal, *Murphy* v. *Wainright*, 72-1392-Civ-CA (December 7, 1972).

On January 28, 1968, Petitioner and three others were apprehended as they fled from the scene of a robbery of a wealthy Miami Beach resident, Olive Wofford. In May, 1968, prior to the trial on charges stemming from this incident, Petitioner was arrested and indicted for the double murder of Terry Rae Kent Frank and Annalie Mohn. The news media referred to these killings as the "Whiskey Creek Murders."

During the pre-trial proceedings in the Wofford robbery case, substantial attention was devoted by the media to a controversial ruling by the trial judge regarding Petitioner's competency to stand trial. Subsequently, the charges in the Wofford robbery case were *nolle prossed* so that the trial in Broward County on the Whiskey Creek Murders could commence. Then on August 14, 1968, Petitioner and three others were indicted by a United States Grand Jury for conspiring to transport stolen securities in interstate commerce. Those charges were closely related to the Whiskey Creek case. On March 1, 1969, Petitioner was found guilty of the murder of Terry Rae Kent Frank. On August 25, 1969, charges in the Wofford robbery case were refiled. In December of the same year, Murphy pled guilty to one count of the federal indictment.

In July of 1970, pre-trial proceedings in the Wofford case began. Petitioner filed a motion for change of venue based on allegedly prejudicial pre-trial publicity. The trial court deferred ruling on this motion until voir dire of the jury panel was completed. On July 27, 1970, the voir dire commenced. It was completed on August 10, 1970. Eventually, Murphy's plea of insanity was rejected and he was convicted and sentenced to serve a term of life imprisonment for the crime of breaking and entering a dwelling with intent to commit robbery being then and there armed and/or assaulting persons therein. He was also sentenced to serve a term of twenty years, consecutive to the first term imposed, for the crime of assault with the intent to commit robbery.

Initially, Murphy contends that the failure to change venue constituted a denial of due process. Petitioner asserts that the publicity surrounding the Wofford robbery

and his notoriety attributable to the "Star of India" theft and "Whiskey Creek Murders" negatived any chance for a fair trial that he might otherwise have had in Dade County.

At the outset, it is important to recognize that a trial judge has broad discretion in determining the proper course of action when allegations of prejudicial pre-trial publicity are made. *United States* v. *Collins*, 5th Cir. 1972, —— F.2d —— [January 24, 1973; No. 72-2063]. Yet that discretion is not unbridled. The Supreme Court has mandated that the federal courts exercise "the duty to make an independent evaluation of the circumstances" surrounding a claim of prejudicial pre-trial publicity. *Sheppard* v. *Maxwell*, 384 U.S. 333, 362 (1966). Nevertheless, Petitioner must sustain the burden of showing that his conviction was a result of "essential unfairness . . . not as a matter of speculation but as a demonstrable reality." *Adams* v. *United States ex rel McCann*, 317 U.S. 269, 281 (1942).

The Court is sensitive to the delicate balance that must be struck as a result of the pervasiveness of modern communications and the need to insure a fair trial for the accused. The dilemma facing the courts today and the approach that must be taken pursuant thereto were set forth by the United States Court of Appeals for the Second Circuit in *United States* v. *Agueci*, 310 F.2d 817, 832 (1962):

> The typical jury, in this age of mass communications, is not hermetically sealed from the events occurring all about them. Of course, an effort must be made by the trial judge to caution jurors against considering extra-judicial statements pertinent to the guilt or innocence of the individuals upon whom they sit in judgment. Where the cautionary instructions are adequate, as they were here, and where the news reporting was merely routine and hardly inflammatory, the trial judge does not abuse his discretion by refusing to declare a mistrial: "Trial by newspaper may be unfortunate, but it is not new and, unless the court accepts the standard judicial hypothesis that cautioning instructions are effective, criminal trials in the large metropolitan centers may well prove impossible." (citations omitted)

Built into our system are numerous procedures by which the effects of prejudicial pre-trial publicity may be uncovered and eliminated. Chief among these are the granting of a continuance or change of venue and the conducting of an extensive voir dire of prospective jurors.

The trial judge properly deferred ruling on the motion for a change of venue in the case *sub judice* until he had an opportunity to see the results of the voir dire of the jury panel, which was conducted by counsel. *See Hoffa* v. *Gray*, 323 F.2d 178, 180 (6th Cir. 1963), *cert. denied* 375 U.S. 907. The trial court's action was reasonable in light of the fact that the publicity surrounding Petitioner's exploits had, to a great extent, subsided by July of 1970. Moreover, the judge would have no reason to believe that Murphy, who was known statewide, if not nationwide, would not have as good an opportunity to receive a fair trial in Dade County as he would have anywhere else in Florida. In any event, an extensive voir dire would stand as the primary safeguard against the erosion of Petitioner's right to a fair trial because of the existence of allegedly prejudicial pre-trial publicity.

Petitioner contends, however, that the results of the voir dire of the panel necessitated the granting of his motion to change venue. A thorough review of the record of the voir dire reflects the following disposition of the panel. Of the seventy-eight jurors questioned, twelve were excused peremptorily by the Petitioner; twenty-seven were excused for medical, family or economic reasons; three were excused for miscellaneous reasons; twenty were excused because they had formed an opinion that Petitioner was guilty and they could not give the Petitioner a fair trial; eight prospective jurors were peremptorily excused by the State. Eight jurors were selected to serve at the trial—six regular and two alternates.

Of the eight selected, five had read or heard about the facts surrounding the Wofford robbery through the media, from discussions with friends and neighbors, or through discussions with other prospective jurors. Each of the eight selected jurors knew that the Petitioner had previously been convicted in either the Star of India theft or the Whiskey Creek murders.

The crucial issue before this Court is whether either knowledge of the facts surrounding the Wofford robbery or knowledge of the Petitioner's prior felony convictions was sufficient to render these jurors impartial in light of their assurances to the court that they would reach a verdict based solely on the evidence introduced at trial.[2] The Supreme Court of the United States, realizing the dilemma faced by the courts in ensuring a fair trial for the accused who has been the target of pre-trial publicity, set forth the test for ascertaining the impartiality of a prospective juror. The Court stated:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any pre-conceived notion as to the guilt or innocence of the accused, without more, is

[2] Florida law provides as follows:

§ 913.03 Grounds for Challenge to Individual Jurors for Cause

10) The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent him from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he declares and the court determines that he can render an impartial verdict according to the evidence.

> sufficient to rebut the presumption of a prospective jurors impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Irvin* v. *Dowd*, 366 U.S. 717, 722-23 (1961).

Petitioner is in the position of asking this Court to infer that the jurors in this case were biased because they were aware of his prior felony convictions or were familiar with some of the facts and issues involved in the case. The Court hesitates to draw such an inference in light of each juror's protestations of impartiality. Petitioner carries the burden of proving "whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. . . . Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside. . . ." *Reynolds* v. *United States*, 98 U.S. 145, 156-57 (1878).

The Court is not without some objective criteria by which the jurors' proclamations of impartiality may be measured. If the pre-trial publicity were intensive or extensive or the examination of the entire panel revealed widespread prejudice against the defendant, the Court could, as a matter of law, disregard the jurors' estimation of themselves. *Beck* v. *Washington*, 369 U.S. 541 (1962). After careful consideration of the record, the Court concludes that no such widespread prejudice against the Petitioner was harbored by the jury panel. Furthermore, the publicity of which Petitioner complains was, as the State appellate court found, largely factual, rather than inflammatory in nature. Also, the dates on the great majority of newspaper clippings and edited television news releases show that they had been published between December 15, 1967 and January 24, 1969. Only five articles have been presented to the Court bearing dates of the period of the jury selection and of these, only one received front-page coverage.

Petitioner's contention that publicity which focused upon him a year and a half to three years prior to trial must be deemed conclusively prejudicial must fail in light of the Supreme Court's opinion in *Beck* v. *Washington, supra.* In *Beck,* the defendant, a labor union official, was convicted on a charge of embezzlement of union funds. His trial occurred nine and one-half months after he was first called before a highly-publicized Senate Committee and five months after indictment. The publicity that arose at the time of trial was neither intensive nor extensive. Addressing itself to the contention that the defendant was prejudiced by the pretrial publicity, the Court stated:

> Although most of the persons thus selected for the trial jury had been exposed to some of the publicity related above, each indicated that he was not biased, that he had formed no opinion as to petitioner's guilt which would require evidence to remove, and that he would enter the trial with an open mind disregarding anything he had read on the case. 369 U.S. at 557.

The passage of time is a crucial factor in determining the effects of the pre-trial publicity on a jury panel. In fact, the Court finds that each of the five jurors who had some knowledge of the facts of the Wofford robbery possessed only a vague recollection of the facts. The cases relied upon by Petitioner, *Pamplin* v. *Macon,* 364 F.2d 1 (5th Cir. 1966); *United States ex rel Bloeth* v. *Denno,* 313 F.2d 364 (2d Cir. 1963); *Sheppard* v. *Maxwell, supra*; and *Irvin* v. *Dowd, supra* are inapposite. Those cases present situations factually distinct from the case *sub judice.*

The issue of whether each juror who possessed knowledge of Murphy's previous felony convictions should have been excluded from service for cause is more troublesome. Those convictions were inadmissible at trial since Murphy did not take the stand.[3] The Court finds, however, that Petitioners' reliance on *Marshall* v. *United*

[3] Fla. R. Evid. 99.

States, 360 U.S. 310 (1959) is misplaced. In *Marshall* the defendant was charged with unlawfully dispensing drugs without a prescription in violation of 21 U.S.C. § 353(b)(1)(B). The defendant did not take the stand but he did raise the issue of entrapment. Seeking to rebut this issue, the Government proferred proof that petitioner had previously practiced medicine without a license. The trial judge refused this offer on the grounds of relevance and prejudice. During the trial, though, two newspaper articles, which reflected petitioner's past felony convictions and admissions to having previously dispensed drugs without a license, were read by seven jurors. Despite the fact that the trial judge subsequently subjected each juror to intensive voir dire to insure that his impartiality was not compromised, the Supreme Court reversed the conviction. In so doing, however, the Court stressed that the action was taken pursuant to its inherent supervisory powers only. *Marshall, supra* at 313. The Court refrained from analyzing the issue in terms of due process standards.

It is axiomatic that a federal district court will not sit as an appellate court to review the wisdom of state court procedures or to review all errors that may be claimed to have been committed in the course of state criminal trial. The concept of federalism dictates that federal courts overturn a state conviction only where specific constitutional protections have been impugned or where circumstances amounting to a denial of fundamental fairness exist. *Colbroth* v. *Wainwright,* 466 F.2d 1193 (5th Cir. 1972), *Flanagan* v. *Beto,* 437 F.2d 895 (5th Cir. 1971). The relationship between the federal supervisory power, which underlies the Marshall opinion, and the commands of due process was set forth by the Supreme Court in *McNabb* v. *United States,* 318 U.S. 332 (1943). The Court stated:

> For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice," *Herbert* v. *Louisiana,* 272 U.S. 312 (1926), which are secured by the Fourteenth Amendment,

the scope of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our Federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the Federal criminal law in the Federal courts. 318 U.S. 340-41.

Although the situation in *Marshall* is factually similar to the instant case, the rationale of that opinion militates against Petitioner's position. This Court, then, finds that a trial by jurors, each of whom has obtained knowledge of a defendant's past felony convictions through pretrial publicity does not, in light of the Supreme Court's refusal to so find, rise to Constitutional proportions when each juror has satisfied the impartiality requirements set forth in *Irvin* v. *Dowd, supra.* The Court recognizes that the distinction between acts or occurrences which warrant the exercise of federal supervisory powers and those which reflect a denial of due process is often a nebulous one. Nevertheless, the dictates of federalism compel this Court to abide by that distinction whenever it exists. Petitioner's claim regarding the effects of pretrial publicity must fall.

Similarly, Petitioner's argument that the trial court committed reversible error in denying his motion to bifurcate the trial on the issues of guilt and sanity must

fail in light of the nature of this review. A separate trial on the issue of insanity[4] is not required by the Constitution and a state or court may validly consider its purposes better served by resolution of the issues of guilt and sanity in a single trial. *See, McGautha* v. *California*, 402 U.S. 183 (1971), and *Spencer* v. *Texas*, 385 U.S. 554 (1967).

Accordingly, it is ordered and adjudged that the Petition for Habeas Corpus is hereby denied.

DONE AND ORDERED at Miami, Florida this 27th day of August, 1973.

/s/ C. Clyde Atkins
United States District Judge

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[4] Under Florida procedure, the defendant is not entitled of right to a separate trial on the issue of insanity. *Williams* v. *State*, 100 Fla. 814, 130 So. 456 (1930).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 73-151-Civ-CA

JACK ROLAND MURPHY, PETITIONER

v

THE STATE OF FLORIDA, RESPONDENT

AMENDED ORDER

THIS CAUSE has come before the Court on its own motion to amend the Order of August 29, 1973 to read as follows:

Add to next to last paragraph of Order after sentence ending with the words "in a single trial." and before the signal *See* the following citation: *United States* v. *Huff*, 409 F.2d 1225 (5th Cir. 1969), *cert. denied* 396 U.S. 857.

ENTERED at Miami, Florida this 1st day of November, 1973.

United States District Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 73-3528

JACK ROLAND MURPHY, PETITIONER-APPELLANT

v.

STATE OF FLORIDA, RESPONDENT-APPELLEE

June 10, 1974

State prisoner petitioned for habeas corpus. The United States District Court for the Southern District of Florida, at Miami, C. Clyde Atkins, J., 363 F.Supp. 1224, denied the petition, and petitioner appealed. The Court of Appeals, Simpson, Circuit Judge, held that (1) failure to grant defendant's motion for a change of venue on ground of prejudicial pretrial publicity was not a denial of due process, (2) trial by jurors who knew that defendant was a convicted felon did not rise to constitutional proportions and was thus not ground for issuance of writ, and (3) refusal of state trial court to grant a bifurcated trial on the issues of guilt and sanity did not rise to constitutional dimensions and was therefore not ground for issuance of writ.

Affirmed.

1. Constitutional Law § 259

Failure to grant defendant's motion for a change of venue on ground of prejudicial pretrial publicity was not a denial of due process, where newspaper articles were largely factual rather than inflammatory, where most of the publicity occurred a year and a half to three years prior to trial, and where the five jurors who had some knowledge of the facts of the robbery possessed only a vague recollection thereof.

INDEXED

2. Habeas Corpus § 85.3(1)

Statement made by federal judge 16 months prior to state court trial of robbery case, and addressed to entirely different considerations, was irrelevant in the context of habeas corpus petition attacking state court convictions.

3. Habeas Corpus § 85.5(8)

Trial by jurors who knew that defendant was a convicted felon did not rise to constitutional proportions and was thus not ground for issuance of writ of federal habeas corpus, where each juror satisfied impartiality requirements in light of their assurances to the court that they would reach a verdict based solely on the evidence introduced at trial.

4. Habeas Corpus § 45.2(1)

Refusal of state trial court to grant a bifurcated trial on the issues of guilt and sanity did not rise to constitutional dimensions and was therefore not ground for issuance of writ of federal habeas corpus.

5. Constitutional Law § 263

Due process does not require a separate trial, and the states and their courts are free to determine whether the issues of guilt and sanity should be tried separately or together.

Appeal from the United States District Court for the Southern District of Florida.

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

The lower court, by a reported opinion, Murphy v. State of Florida, S.D.Fla.1973, 363 F.Supp. 1224, denied appellant's petition for habeas corpus relief from two state

sentences received in a single trial, to life imprisonment for armed robbery and consecutively to twenty years imprisonment for assault with intent to commit robbery.

We affirm.

The attack upon the state convictions both in the trial court and here is based primarily upon a claim of denial of Fourteenth Amendment due process because of extensive pre-trial newspaper publicity regarding Murphy, known as "Murph the Surf",[1] and resultant prejudice to his Sixth Amendment right to a trial before an impartial jury. Inasmuch as the background facts are fully set forth in the lower court's opinion,[2] a brief outline of them will suffice here.

The issues here as below are (1) whether the Florida state trial court erred in denying appellant a change of venue in the light of the pre-trial publicity; (2) whether that court erred in failing to dismiss for cause those trial jurors who knew Murphy was a convicted felon; and (3) whether that court erred in refusing to bifurcate the trial on the issues of guilt and sanity.

Petitioner was arrested with three other persons in January 1968 as they fled the scene in Dade County, Florida of the robbery of Mrs. Olive Wofford, a wealthy resident of Miami Beach. In May, 1968 before his trial for the Wofford robbery, the petitioner was arrested and indicted for the double murder in an adjoining Florida county, Broward, of two young women, Terry Rae Kent Frank and Annalie Mohn. These killings became notorious in the press as the "Whiskey Creek Murders."

Pre-trial proceedings in the Wofford robbery case involved the trial judge's controversial ruling as to the petitioner's competency to stand trial. Extensive newspaper coverage again occurred. The robbery charges in the Wofford case were nolle prossed to permit the Broward

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[1] Murphy had received nationwide press attention in 1964 for his role in the theft of the "Star of India" sapphire from the New York Museum of Natural History. The public media's use of the nickname "Murph the Surf" dated from that time.

[2] Adopted as correct by both parties to this appeal.

County trial for the Whiskey Creek Murders to proceed. In August 1968, prior to that murder trial, Murphy and three others were indicted by a federal grand jury for conspiring to transport stolen securities in interstate commerce, charges related to the Whiskey Creek case and so played up in the press. Murphy was found guilty on March 1, 1969, of one of the Whiskey Creek Murders, that of Terry Rae Kent Frank. Again, the trial and its result were extensively publicized by the news media.

Thereafter on August 25, 1969, the state prosecutor refiled the Wofford robbery case. In December of the same year, Murphy pled guilty to one count of the federal indictment.[3] During the early July 1970 pre-trial proceedings in the Wofford case, Murphy moved for change of venue on the basis of prejudicial pre-trial publicity,

[3] A statement made by the presiding judge, U.S. District Judge Eaton, in the course of these proceedings did not occur shortly before the Wofford robbery trial in the state court, as stated by appellant's brief. The record shows that Judge Eaton's statement was made at a March 6, 1969 hearing, not at a 1970 hearing, as appellant's brief seems to indicate. At that hearing Judge Eaton granted a continuance of the case before him, No. 68-360, rather than rule on a motion for change of venue. His ruling was based on expediency:

> "I am forgetting the question of prejudice and being very practical about it . . . I think if we tried to do that next week, that we would spend a week on voir dire and never conceivably get a jury. Speaking of the time in Court, I have five other criminal cases I could be trying while we are asking these folks if they know anything about Murph the Surf, because I am telling you, they do. People in this County can tell you who Murphy is, who would not have the slightest idea who Earl Faircloth is, and I think that is a fair statement. I am not talking about any prejudicial newspaper coverage at all. It may be that because Mr. Murphy has simply sort of, somehow or another, become pretty good publicity; but the point is, considering for a moment every count in every trial which was ever had was entirely fair, this man is simply too widely known, and so is Griffith and Kuhn, to some degree."

As noted in the text, Murphy pled guilty to one count of this indictment in 1969. Judge Eaton thereafter granted a change of venue to Pensacola in the Northern District of Florida to the remaining defendants under that indictment. Their case was tried and disposed of by him in Pensacola in April 1970.

including the publicity attendant upon the earlier hearing in the Wofford robbery case, the Star of India theft, the Whiskey Creek Murders, and the federal conspiracy charges. The state trial judge deferred ruling on this motion pending voir dire examination of the jury panel. Voir dire commenced on July 27 and was completed on August 10, 1970. Of 78 veniremen questioned, 12 were excused peremptorily by the petitioner, and 8 by the state, 27 were excused for medical or economic reasons and 3 were excused for miscellaneous reasons. 20 were excused because they stated that they had formed an opinion as to petitioner's guilt and could not give him a fair trial. 8 jurors were selected to serve at the trial, 6 regular and 2 alternate.

Of the 8 selected, 5 had read or heard about the facts surrounding the Wofford robbery through the media, from discussions with friends or through discussions with other prospective jurors. Each of the eight knew that Murphy had previously been convicted either in the Star of India theft or the Whiskey Creek Murders, but each assured the court that he would reach a verdict based solely on evidence introduced at the trial. The court denied the motion for change of venue and the trial proceeded. Murphy's plea of insanity was rejected and he was convicted and sentenced, as noted supra, to life imprisonment and to a term of twenty years consecutive thereto.

The court below carefully weighed the claim of denial of due process on the basis of prejudicial pre-trial publicity, accepting his "duty to make an independent evaluation of the circumstances", Sheppard v. Maxwell, 1966, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, but imposing upon the petitioner the burden of showing that his conviction was a result of "essential unfairness . . . not as a matter of speculation but as a demonstrable reality", Adams v. United States ex rel. McCann, 1942, 317 U.S. 269, 281, 63 S.Ct. 236, 242, 87 L.Ed. 268. The district court was "sensitive to the delicate balance that must be struck as a result of the pervasiveness of modern communications and the need to insure a fair trial for the accused", 363 F.Supp. at 1226, adopting the approach

set forth in United States v. Agueci, 2 Cir. 1962, 310 F.2d 817, cert. denied, 1963, 372 U.S. 959, 83 S.Ct. 1016, 10 L.Ed.2d 12; Irvin v. Dowd, 1961, 366 U.S. 717, 722-723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751, and Reynolds v. United States, 1878, 98 U.S. 145, 156-157, 25 L.Ed. 244. The district judge found the presence of some objective criteria, Beck v. Washington, 1962, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98, in the nature and the time span of the pre-trial publicity. We are in agreement with his determination that since the newspaper articles were largely factual rather than inflammatory, and since the dates of the news clippings and edited television news releases were almost entirely between December 15, 1967 and January 24, 1969 (only five articles being presented to the court bearing dates of the period of the jury selection and only one of those being a front-page article) the passage of time is a crucial factor in this case. We find no record basis upon which to disturb his finding that "each of the five jurors who had some knowledge of the facts of the Wofford robbery possessed only a vague recollection of the facts." 363 F.Supp. at 1229.

[1] We agree with the district court that the failure to grant the motion for change of venue was not a denial of due process.

[2] In this connection the petitioner urges that the language used by Judge Eaton (quoted Note 3, supra) in granting a continuance in the federal conspiracy trial show that a change of venue was mandated in the Wofford robbery trial in state court. This is a new contention, not relied upon before the district court. These remarks were as Judge Eaton stated, not based on the question of prejudice, but entirely on his own estimate of the practicalities of the situation and the conservation of his own judicial time. Made as it was sixteen months prior to the state court trial of the Wofford robbery case, and adressed to entirely different considerations, his statement is irrelevant in the context of this habeas corpus petition. We find petitioner's argument in this respect to be without substance.

[3] The second issue, whether each juror who possessed knowledge of Murphy's previous felony convic-

tions, should have been excluded for cause is, as stated by the court below, more troublesome, but we affirm his rejection of this ground of attack by his excellent analysis at pages 1229-1230, 363 F.Supp. As pointed out there, Marshall v. United States, 1959, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250, will not support issuance of the writ on this ground, since as the Supreme Court was at pains to point out, 360 U.S. at 313, 29 S.Ct. at 1171, its action was taken in that direct criminal appeal pursuant only to its inherent supervisory powers and not in terms of due process standards. We think the district court correctly appraised the situation in its refusal on grounds of federalism to grant the writ on this ground of the petition.[4] The district court's holding in this respect is well summarized in the following language:

> "Although the situation in *Marshall* is factually similar to the instant case, the rationale of that opinion militates against Petitioner's position. This Court, then, finds that a trial by jurors, each of whom has obtained knowledge of a defendant's past felony convictions through pre-trial publicity does not, in light of the Supreme Court's refusal to so find, rise to Constitutional proportions when each juror has satisfied the impartiality requirements set forth in Irvin v. Dowd, supra. The Court recognizes that the distinction between acts or occurrences which warrant the exercise of federal supervisory powers and those which reflect a denial of due process is often a nebulous one. Nevertheless, the dictates of federalism compel this Court to abide by

[4] We are aware of the view announced in United States ex rel. Doggett, 3 Cir. 1973, 472 F.2d 229, 237-239, that Irvin v. Dowd, supra, and Sheppard v. Maxwell, supra, broaden the *Marshall* holding so as now to require that its rule be applied to state trials. While the question arose in a prejudicial publicity-change of venue setting in *Doggett*, we do not seriously doubt that the Third Circuit would apply its holding equally in a situation involving, as presently under discussion, denials of challenges for cause based on a juror's knowledge of prior convictions. With deference, we disagree with our sister Circuit's conclusion and decline here to be guided by *Doggett*.

that distinction whenever it exists. Petitioner's claim regarding the effects of pre-trial publicity must fall." 363 F.Supp. at 1230.

[4, 5] Finally, we agree with the holding below that the final ground of attack, the refusal of the state trial court to grant a bifurcated trial on the issues of guilt and sanity, does not rise to constitutional dimensions. Due process does not require a separate trial and the states and their courts are free to determine whether such issues should be tried separately or together. United States v. Huff, 5 Cir. 1969, 409 F.2d 1225, cert. denied, 1969, 396 U.S. 857, 90 S.Ct. 123, 24 L.Ed.2d 108.

The judgment appealed from is in all respects

Affirmed.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

July 12, 1974

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130

TO ALL COUNSEL OF RECORD

Re: 73-3528 MURPHY v. STATE OF FLORIDA

Gentlemen:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

By /s/ Anne G. Parent
Deputy Clerk

cc: Mr. Harvey S. Swickle
Mr. J. Robert Olian
Mr. Robert L. Shevin
Mr. William L. Rogers

EXCERPTS FROM TESTIMONY OF JOSEPH S. FRANKFORD

(TR. 33)

Q. Now, please tell us, if you will, when you first heard of Murphy the Surf and what you know about him.

A. Well, if I'm not wrong, if I am not wrong, it has some connection with a controversy between the Judge and Mr. Gerstein.

(TR. 34)

* * * *

Q. Now, did you hear that Murphy was declared insane by Judge Stedman?

* * * *

A. Correct.

Q. Do you know anything more about that controversy?

A. No, I don't remember.

EXCERPTS FROM TESTIMONY OF LYNETTE TROUT

(TR. 40)

MR. NAGELEY: I would like to ask the prospective juror if she understands the Statute exemption that she can exercise with all of the children that she has.

THE JUROR: I have a sister at home full time, and she has encouraged me to come here.

* * * * (TR. 47)

Q. Have you heard anything about this that would make you totally unable to give this Defendant a fair trial?

A. Not to my knowledge.

* * * * (TR. 54)

Did you ever hear your children use the term "Murf the Surf"?

A. I have used it, but I don't know that they have.

Q. In what context?

A. Just by saying that he was in trouble.

Q. Ma'am, we are not questioning now the actual recall of your memory, because all of our memories are dimmed by time and by the passing of time, but would you tell us, as fully as you can, what you know of Murph the Surf?

A. Except for what the State man said, I don't know anything, except that he robbed, and that's about all that I would have remembered.

Q. What did he rob?

A. A home.

(TR. 55)

Q. Did you ever hear of the Museum of Natural History in New York, from which the Star of India and the Di Longe ruby were stolen?

A. That was further back.

Q. What do you know about that?

A. That they were supposed to have stolen those gems.

Q. Who?

A. Murphy the Surf, and some of his friends.

Q. Do you know that he pled guilty to that offense and got three years in Riker's Island, New York?

A. I don't think I followed it.

Q. Now, do you connect him with that crime?

A. Until you brought it up, I did not.

Q. Have you heard of the case called the Whisky Creek murders in Broward County?

A. Only because it was on the radio this morning.

* * * * (TR. 57)

BY MR. NAGELEY:

Q. Do you believe Murphy to be a criminal?

A. He has been convicted of a crime.

Q. And you have heard much publicity about him, have you not, in keeping abreast with current events?

A. Well, quite a bit—quite a bit.

Q. Did you, in your experience, do you remember Murphy ever having been declared insane by Judge Carling Stedman?

MR. JACOBS: I object to that.

THE COURT: Overruled.

THE JUROR: I heard he was declared insane but I did not know who did it.

• • • • (TR. 59)

Q. Could you give the same trial to Murphy that you could give to a person you never heard of?

A. I would not base my verdict on what I have heard, but what happens here. I believe that I can be impartial.

• • • •

EXCERPTS FROM TESTIMONY OF MARY L. FOSTER

(TR. 75)

BY MR. NAGELEY:

Q. Have you ever heard of Jack Murphy, also known as Murphy the Surf, before?

A. Yes, sir.

Q. Tell us what you know about him. We are not checking the accuracy of your memory, but, please, if you can, just tell us what you know about Jack Murphy, and take all the time that you want. Take an hour if you need it to tell us everything you know about him, because it means something very important to us.

A. I don't believe that I can say anything specifically, but I have heard the name for years, and I have heard the name in connection with things, but I don't know anything—no specific incidents in which I would connect him.

Q. Mr. Jacobs said this case attracted considerable publicity, and you said that you were aware of that.

A. Yes, sir.

(TR. 76)

• • • •

Q. Now, what does Murphy the Surf denote or connote to you? Does it mean that he is an artist or a trapeze specialist, or a criminal, or does it mean that he is a baker or butcher?

A. What does it mean?

• • • •

When I see his name, I naturally connect it with the underworld or the criminal world.

(TR. 77)

Q. Criminal?

A. With crime.

• • • • (TR. 78)

BY MR. NAGELEY:

Q. Ma'am, did you ever hear of the theft of the Star of India and the DiLonge Ruby from the Natural History Museum in New York City?

A. Yes, I remember that it was in the paper, also, but I don't remember the details.

• • • • (TR. 79)

Q. What paper do you read, ma'am?

A. The Miami Herald, and the Miami News.

Q. Have you read anything in the last two years about Murph the Surf in the Miami News?

A. I recall reading it in the headlines, and then I skipped the stories.

(TR. 80)

Q. Now, please take your time.

Do you remember anything you read in the Miami Hearld with reference to Murph the Surf?

A. I could not name one specific incident.

Q. Do you have a television set?

A. Yes.

• • • • (TR. 81)

Q. Did you ever hear of the Whisky Creek murders in Broward County?

A. Yes, I have.

Q. Tell us what you know about it, ma'am?

A. That there were some girls killed.

TR. 82)

Q. Do you connect Murph the Surf with the Whisky Creek murders?

A. I am sure that I heard his name connected with it.

Q. Ma'am, from your experience right now, do you know whether Murphy has been convicted of a crime, from what you have heard on the radio, the TV, and the newspapers or otherwise?

A. I could not tell you that. No, I don't.
Q. You don't know he has been convicted of a crime?
A. No.

• • • • (TR. 94)

What I am saying to you, lady, is this: Is your mental condition at this time, at the outset of this trial, so fixed, in your own mind, either for or against the State or either for or against the Defendant, that you could not yield to the evidence to be produced in this case, or the failure to produce evidence in this case. Could you exclude all of those other matters which have been recited to you here, and which you have recalled from your mind, and, predicate your verdict in this case solely upon the evidence to be brought forth in this trial, or that which has failed to be brought forth in this trial.

(TR. 95)

Do you understand my question?
THE JUROR: Yes, sir.
THE COURT: What is your answer?

(Silence)

MR. NAGELEY: Let the record reflect that the prospective juror is remaining silent, and is hesitating to answer the question.
THE JUROR: I am not sure. I am not sure that I could do that.

• • • • (TR. 99)

BY MR. NAGELEY:

Q. Do you know that, ma'am, that the theft of a half a million dollars in securities was the motive for the Whiskey Creek murder?
A. I read about it, yes.

(TR. 100)

Q. Did you hear that he pled guilty to the theft of the half a million dollars in securities, of that offense, and got five years? Did you hear that he pled guilty to that offense and got five years?
A. Yes, sir.
Q. Is that your answer?

A. Yes.
Q. Ma'am, did you also learn from whatever association you had with the newspapers, TV, or radio, that the half a million dollars in securities was the motive for the killing of the girls at Whisky Creek?
A. I probably did, but I don't remember the details about it.

• • • • (TR. 105)

Q. You sit there and say that you can give him a fair and impartial trial?
A. I think I can give him a fair and impartial trial, considering what the Judge had just said.

EXCERPTS FROM TESTIMONY OF MARY A. TERRELL

(TR. 127)

BY MR. NAGELEY:

Q. Do you and your husband try to keep abreast of current events that happen in Dade County, Florida?
A. Try to.
Q. And how do you do that ma'am, how do you go about that?

(TR. 128)

A. Well, I watch television and I read the newspapers.
Q. What television station do you watch, particularly with reference to the news?
A. Channel four.
Q. Do you read the papers?
A. Yes, sir.
Q. What papers do you read?
A. I read the Herald and the Guide, which is delivered in our section.
Q. What part of the Miami Herald do you read?
A. I read most of it.
Q. Do you read it, and by the way, have you been receiving the Herald since January of 1968?
A. Yes.

Q. No, the 28th day of January, 1968, that's the date of the alleged commission of the offense in this case—
A. I did not know why you kept saying that date.

• • • • (TR. 129)

Q. Now, in the newspapers and TV, have you ever heard the name Murph the Surf before?

(TR. 130)

A. Yes, I have.
Q. When did you first hear the name, approximately?
A. When I first heard it, I think I heard it used—I am not sure, but I think I heard it used first where it had to do with diving on Miami Beach.

• • • • (TR. 132)

Q. Ma'am, do you remember just last year in Broward County about the Whisky Creek murders?
A. Yes.
Q. Do you connect Mr. Murphy with those?
A. Yes.
Q. Tell us what you know about that?
Just tell us whatever you have read and whatever you have heard?

(TR. 133)

A. I don't remember too much, but I do remember that it had something to do with bonds, stolen bonds, or something.
Q. Right.
Can you connect Mr. Murphy with those bonds?
A. Well, let me ask you this. I believe there were some girls that were connected with the bonds.
Q. Do you know what happened to those girls?
A. Yes.
Q. What happened to them?
A. They were killed.
Q. Do you connect Mr. Murphy in any way, from any experience with this—their deaths?
A. Deaths—I don't remember, but I think he was charged, but I don't remember the outcome of that.
Q. But, do you know that he was tried in Broward County on that?

A. I did not know where he was tried.

• • • • (TR. 135)

BY MR. NAGELEY:

Q. Incompetent is the word. What is your answer? Do you remember something about him being declared incompetent?
A. I remember something about it.
Q. What do you remember about that, if anything, ma'am?
A. I just remember reading that he was insane.

• • • • (TR. 137)

BY MR. NAGELEY:

Q. Ma'am, knowing as you do, of the death of the two girls in Whisky Creek and of the half a million dollars theft in securities as to the motive for the crime, do you think that you could give Mr. Murphy a fair and impartial trial?
A. I think I could, yes.
Q. Now, notwithstanding that, do you know, ma'am whether or not Murphy has ever been convicted of a crime.
A. I think I read that he has been in jail, so he must have been convicted of a crime.
Q. Notwithstanding this knowledge, and his part in it, is it still your testimony that you could give Mr. Murphy a fair and impartial trial?

(TR. 138)

A. Well, this would have to be another trial that he would have to be convicted of.
This would be a new trial and we would have to start all over with new evidence.

• • • • (TR. 140)

BY MR. NAGELEY:

Q. Then, is it your testimony that you could go into that jury room, after hearing the facts of this case, and knowing of his criminal record, and you could block that out?

(TR. 141)

A. Yes, you would have to.
Q. How are you going to do that?
MR. JACOBS: I object to that.
THE COURT: Overruled.
MRS. TERRELL: If you are fair, that's what you have to do.

BY MR. NAGELEY:

Q. Now, ma'am, am I correct in assuming that when you go into that jury room, and you are deliberating with your fellow jurors, in your discussions, you are going to blot out his past?
A. I would try to.
Q. You would try to, but now—
A. I would try to—well, like everyone else, I would think about it, but I would try to say that it doesn't matter, because you are judging this particular case, now.
Q. Your opinions in this case would not be infiuenced?

(TR. 142)

A. I would hope not.
Q. The answer, "I hope not".

* * * *

(TR. 145)

Do you want to serve for the remainder of the week, or do you want to be excused?
MRS. TERRELL: I would like to be excused.

* * * *

EXCERPTS FROM TESTIMONY OF LULA M. SALES

(TR. 154)

BY MR. NAGELEY:

Q. Mrs. Sales, you have heard of the name, Murph the Surf?
A. Yes, sir.

(TR. 155)

Q. That's why you don't believe you can give him a fair trial; is that right?

A. Yes, sir.
Q. Isn't that right?
A. Yes, sir.

* * * * (TR. 158)

BY MR. NAGELEY:

Q. Have you heard of this defendant, Jack Roland Murphy, also known as Murph the Surf?
A. Yes, I have.
Q. Pardon me?
A. Yes, I have heard of him.
Q. Have you read about him in the newspapers?
A. Yes, I have.
Q. And what have you read?
A. Well, I did not know the name at the time that I was reading it, you know, I did not know who it was about some breaking and entering, but I read about so many breaking and enterings in the paper, until I did not know the name until now.

EXCERPTS FROM TESTIMONY OF CHARLES J. CLOUD

(TR. 179)

Q. Now, from the News and the Herald, and from the TV and the radio, and from your social gatherings, and in discussions with your wife or with your son, have you ever heard the name of Murph the Surf before?
A. Yes.
Q. Does that name denote to you, say, sir, a person who is a minister, a person who is a Judge, a person who is a criminal, or a person who is a lawyer, or a person who is a doctor?

(TR. 180)

A. Just someone who has had a lot of publicity, that I have read about, that's in trouble with the Court.

* * * *

Q. Now, you say you know him as someone who had, trouble with the Court, Sir, tell us as quickly as you can, what you remember about him, and it is important to us.

A. You are asking a lot, now, but I remember something about a Whisky Creek, which had to do with Whisky Creek and the death of two women.

Q. Do you know if Murphy was tried for that?

A. I know he was charged with it, of the death of the women, but the outcome of that, I could not honestly tell you what it was.

• • • • (TR. 181)

Q. Do you associate those half-a-million dollars in securities with the motive for the murders at Whisky Creek?

A. Well, it seems to me that I remember that the securities and the murders were involved together.

• • • •

(TR. 182)

Q. Do you connect Murphy with ever having been convicted of a crime?

A. Well, I know he was convicted of something, but I don't know for what, honestly.

• • • • (TR. 186)

BY MR. NAGELEY:

Q. Mr. Cloud, do you think that you can give the same fair and impartial trial to somebody who has a notorious name, who has been convicted of a crime, the same as that you could give to someone that you have never heard of?

• • • • (TR. 187)

THE JUROR: Yes, I could.

BY MR. NAGELEY:

Q. You could give the same fair and impartial trial to both?

A. Yes, it would be more difficult, I am sure, in human beings, and there would be some acceleration, I am sure.

Q. Then your verdict, then, would be influenced by the fact that he was notorious, and also that he had been convicted of a crime; is that correct?

A. I would like to say that it would not be, but I am only human, you know.

• • • • (TR. 188)

BY MR. NAGELEY:

Q. Now, what I am saying, we all want to be fair minded.

A. Yes.

Q. Now, your experience indicates also that we are all prejudiced by certain things, or influenced by certain events.

A. I think without exception, that we are all human beings, and we are influenced some way or the other.

Q. Now, before you have heard anything from Murphy's side of this case, at all, you know he has been convicted of a crime?

A. Well, you told me that, like I also know it from the papers, too.

Q. Now, could you give Murphy—Murph the Surf, knowing him to be convicted of a crime, the same fair and impartial trial that you could for a person who you knew nothing about?

A. I don't know. I could not honestly say that I could. I could not honestly answer that question.

• • • • (TR. 189)

BY MR. JACOBS:

Q. Do you feel, sir, that you have an opinion, one way or another, and that it is so strong, and do you feel that you have an opinion at this point, that is so strong that you could not yield to the Defendant and to the evidence and the law that Judge Stedman charges you?

A. No, I have no such opinion, now. I can assure you of that.

Q. So, if you have any feeling, you will allow it to yield to the evidence, or you will yield to the evidence and the law as His Honor explains it to you; is that correct?

A. Yes.

• • • •

EXCERPTS FROM THE TESTIMONY OF ROSALIND TOPOL

(TR. 203)

Q. Have you heard anything about this case in any of the news media, where the information alleges that it occurred on January 28, 1968?

A. Yes, I have.

Q. At the home of Mrs. Olive Wofford on Miami Beach, where this Defendant and others had broken into her home and an automatic alarm alerted the police, and the home surrounded when the police were called, and this defendant and others were caught immediately or approximately at the scene of this crime?

(TR. 204)

A. I remember it.

Q. Do you remember anything about this that would prevent your giving this defendant a fair trial?

A. I remember everything and that I had a very definite opinion at the time.

Q. I can appreciate that, but let me ask you this question.

Would your opinion yield to the testimony and the evidence produced from this witness stand and the law that Judge Stedman will charge you; or is your opinion so that no matter what you heard here from the witness stand, you could not set aside your personal feelings and follow the law.

A. I feel that my feelings are very strong on the matter, and I don't know, but I am trying to be very honest with you.

(TR. 205)

I don't know if I would be able to set aside my own personal opinion.

Q. Well, you are the only one who can look in your mind and answer that question.

A. I feel as though there is a doubt in my mind—but that I could be impartial.

Q. When you say impartial—

A. To look at all of the evidence.

Q. Would you in your opinion listen to the evidence and yield to the evidence from the witness stand and the law that Judge Stedman charges you?

MR. NAGELEY: I object to that. He is going over this thing over and over again, and she has already answered his questions.

THE COURT: Overruled.

THE JUROR: I am sorry.

BY MR. JACOBS:

Q. Would you allow your opinion to yield to the testimony and evidence produced from this witness stand and the law that Judge Stedman charges you?

(TR. 206)

A. Well, as I said, I have very definite opinions about this, and I can remember it quite well, even though it was two years ago, now. But I feel that way, that I am prejudiced. I can only say that if I were charged to do something and have to sit here, then it would be my duty, and I would try very hard to be impartial.

Q. Do you feel as a citizen, trying to do your duty, that you would allow your opinion to yield to the testimony and the evidence that came from this witness stand and not merely to what you read in the papers?

A. If it were done, I would have to, but I feel as though—I have certain strong opinions about it.

Q. But you would nevertheless allow your opinions to yield to the testimony and the evidence and the law that Judge Stedman charges you, if Judge Stedman says that is the law, then you would follow it to the best of your ability?

(TR. 207)

A. Well, I would try.

* * * * (TR. 208)

THE JUROR: Now, what I would like to say is something to the effect that I don't remember the words exactly, but I thought that I said that I felt as though as I had very strong opinions.

(TR. 209)

I know I have said that while I have been sitting here—very strong opinions about his guilt right now, and I would have to have evidence to make me change my mind; otherwise, is that the way it was read back?

• • • •

(TR. 213-214)

BY MR. JACOBS:

Q. If Judge Stedman charged you that every man who is charged with a crime is presumed innocent under the law, would you follow that law?

A. Well, I understand that.

Q. Would you follow the law, and from your statements previously, you said that you would follow the law—

MR. NAGELEY: Now, I object to this line of questioning—because he is telling her how to answer the question. There is now way this woman can honestly answer this question, where I presume a man is innocent—fine, but this woman's mind is prejudiced, and she could not possibly follow the law, and she is not going to say that she is not going to follow the law, because she is not going to put herself in a position that she could be held in contempt.

• • • •

(TR. 215)

BY MR. JACOBS:

Q. Do you fell that I am forcing you to give an answer?

A. I think you are.

Q. If Judge Stedman charges you that it is the law in our State, that a person, that every man charged with a crime is presumed to be innocent, would you follow that.

A. Can I answer you exactly that question—and I would say that I would try to do it to the best of my ability, but I have said to you that I really feel strongly about this and I have strong opinions about this case, and it would take more than an equal amount of evidence on both sides, it would have to be an over-equal amount of evidence to make me change my mind.

(TR. 216)

I am being very honest with you in responding to your question with my answer.

Q. If Judge Stedman charges you that it is the responsibility of the prosecution to prove the Defendant's guilt beyond and to the exclusion of every reasonable doubt you would follow this.

A. Yes.

MR. JACOBS: That's all.

BY MR. NAGELEY:

Q. Could you set aside your personal feelings?

A. Well, I am being very, very honest with you. I don't know that I can do that, but I am trying to be honest.

As I told you, I have strong opinions about this.

(TR. 217)

Q. Then, you know about the Wofford incident?

A. Yes, sir, I do.

Q. If the State puts on this case, and Murphy dosen't put on a case and doesn't get on the witness stand to testify, you are just going to find him guilty, and you are going to require evidence from him.

A. Yes.

THE COURT: Lady, you are excused for cause. Thank you. You are excused for cause.

EXCERPTS FROM THE TESTIMONY OF RICHARD W. CLINE

(TR. 271)

Q. Now, do you know the name Murph the Surf?

A. Yep.

Q. How do you happen to know it?

A. Radio, TV, newspaper.

Q. I see.

Would you tell us, sir—take all the time you want—tell us what you know about Murph the Surf.

It need not be accurate. I am only asking you what you remember.

A. He was in for life.

(TR. 272)

Q. Do you know what for?
A. Murder of those two girls.
Q. For anything else?
A. For the India sapphire.
Q. Anything else?
A. No, except for what he is up for, the robbery now.
Q. I see.
What about the robbery? Do you know anything about it?
A. About this one, you mean?
Q. Yes.
A. Just what I have heard and read.
Q. Would you please tell us, sir, what you have heard and read?
A. I heard that he was caught and he assaulted a woman.
Q. Now, does your knowledge of this, sir, make you feel that if Murphy didn't take the stand and testify you would tend to find him guilty?
A. Yes.

(TR. 273)

Q. So, in your present frame of reference, you would require testimony from the defendants?
A. Yes.
MR. JACOBS: That calls for a conclusion.
May I have the witness on voir dire?
THE COURT: Yes.

BY MR. JACOBS:

Q. Mr. Cline, just asking—one or two matters.
If Judge Stedman instructed you that the law in this State is that the Defendant is not required to testify in his own behalf; and further, that the jury cannot draw any inferences from his refusal to testify; that the fact that he did not testify, the jury can't draw any inferences from that, would you accept the law that Judge Stedman charges, and follow it.
A. Yes.

(TR. 274)

Q. And now, knowing what the law is, and assuming for the sake of our discussion that you are selected as a

juror, and you heard the testimony, the evidence and the law from Judge Stedman; that during the case, Mr. Jack Murphy did not testify, and Judge Stedman charges you that you are not to consider this against him, would you then follow the law of Judge Stedman, that you are not to hold this against him?
A. Yes.
Q. Okay, I appreciate your answer.

• • • •

BY MR. NAGELEY:

Q. Mr. Cline, in your schooling, you have been taught both in school and from your family, to try to be fair at all times, is that correct?

(TR. 275)

A. Right.
Q. And, as a product of these experiences, this schooling, that causes you to want to be fair to anybody charged with a crime; right.

• • • •

(TR. 278)

BY MR. NAGELEY:

Q. Mr. Cline, could you give the same fair and impartial trial to somebody whom you had never seen or heard of as you could to Murph the Surf?
A. Yes.
Q. You could?
A. Yes.
Q. Now, I believe you stated earlier that because of what you know of Murphy, if he didn't testify you would find him guilty?
A. It sounds right, but—I wouldn't point that he is guilty if he wanted to testify against himself (sic).

• • • •

(TR. 279)

BY MR. NAGELEY:

Q. Whatever evidence you heard, sir, whatever evidence you heard against Mr. Murphy, the fact that he

is a convicted murderer and thief, would that influence your verdict?

A. Yes.

• • • • (TR. 280)

Q. Now, this would influence your verdict; right?

A. Yes and no—put it that way.

Q. And, if, with this experience Mr. Murphy did not present any evidence favorable to himself, wouldn't it compound it in your mind?

A. Try that again.

Q. You said that he is a convicted murderer and thief of the Star of India; that would tend to influence your verdict?

(TR. 281)

A. So-so.

Q. Now, Mr. Cline, if any person were on trial, and you knew that that person had been convicted of a crime of violence before, and he was charged with a crime of violence in the case which you were trying, wouldn't it influence your verdict?

A. Yes.

Q. Now, sir, when somebody like Murph the Surf who is a convicted murderer and a notorious thief, that would influence your verdict, right?

A. Yes.

Q. All right.

Now, if this convicted murderer and this notorious thief didn't offer any evidence, that would make the case even stronger against him in your mind, wouldn't it?

A. Yes.

• • • •

Q. So, is it a fair statement to say that your verdict would be influenced by what you already know about Mr. Murphy?

(TR. 282)

A. I would have to hear what is up for him now.

Q. But, notwithstanding at all, you are committed to the proposition that Murphy would have to give evidence himself?

A. Yes.

• • • •

(TR. 283)

BY MR. JACOBS:

Q. Is there any reason that you know of that you cannot give this man a fair trial?

A. No.

• • • •

BY MR. NAGELEY:

Q. Sir, again, if you were to be picked as a juror in this case, and you went into the jury room, and nobody but you heard about Murph the Surf, and there is one person who says "I am holding out for not guilty" would you tell that person that Murphy is a convicted murderer?

(TR. 284)

A. I don't think it would be possible not to hear about him.

• • • • (TR. 288-289)

BY THE COURT:

Q. Mr. Cline, are your thoughts and mental processes in that condition at this time that you could not receive the evidence in this case, and the various charges of law to be read to you by the Court to which you should apply the evidence in arriving at your verdict—

Is your mind in such a condition—whatever that condition may be—that it could not yield to the evidence or yield to the law in applying the law to the evidence, or are you of such fixed opinion one way or the other that you could not accept the evidence, if you believe it to be worthy of credence, and you could not accept the law that would be read to you and instructed to you as the law of the case?

A. I have no fixed opinion on it—on him.

I would like to hear the evidence brought forth against him.

Q. Would your verdict in this case be predicated upon the evidence and the law in this case, to the exclusion of any prior knowledge that you may or may not have, or any prior opinion that you may or may not have with regard to this Defendant and this charge.

(TR. 290)

A. We are worried about this charge. That's all I know about.

THE COURT: Motion for disqualification is denied.

MR. NAGELEY: Challenge pre-emptorily.

EXCERPTS FROM TESTIMONY OF
DONALD C. ELKIN

(TR. 296-297)

MR. JACOBS:

Q. Do you feel that you can give this defendant, Jack Roland Murphy, also known as Murph the Surf, a fair trial?

A. I believe so, yes.

• • • •

EXCERPTS FROM TESTIMONY OF
ARNOLD EISEN

• • • • (TR. 309)

Q. Maybe, I didn't make the question clear.

(TR. 310)

Let me rephrase it: If the evidence shows you that this Defendant, Jack Roland Murphy, also known as Murph the Surf, at the time that he committed this act alleged in the Information, that he had a mental problem of sorts, or a condition, but he knew and understood the difference between right and wrong, will you then hold him responsible for his actions?

A. Yes, I would; but just—that there is so much publicity about it that he was proven not insane in the last trial—

Q. That is another point I want to discuss with you.

MR. NAGELEY: Objection. I am sure that the juror hasn't completed his statement.

MR. JACOBS: Did I interrupt?

A. (Mr. Eisen) No, you didn't interrupt.

THE COURT: Overruled.

MR. NAGELEY: Do you wish to say something more?

(TR. 311)

MR. EISEN: No, that is almost a preconceived decision about that.

MR. JACOBS:

Q. I appreciate that, but let me ask you this.

Would this opinion you have, can you set the opinion aside and listen to the testimony and the evidence from this witness stand and the law that Judge Stedman will charge you with?

Will you decide this case on the evidence from the witness stand and the law that you hear from Judge Stedman?

A. Well, I think it is pretty hard for me to just separate the whole thing.

Q. You are the only one who can look into your own mind.

A. Yes, I think so.

It would be pretty hard to separate them.

Q. Do you feel you could do it?

A. I would make a try, but I can't say I could pick out the previous news or the previous stories I have heard.

(TR. 312)

Q. I understand that.

• • • •

EXCERPTS FROM THE TESTIMONY OF
ALFRED B. FREBEL

(TR. 323)

Q. Now, from Monday until today, did you have any discussions with any other prospective jurors or any other persons about this case?

A. Well, I heard some talk about it, but I refrained from discussing it personally myself.

Q. You weren't admonished by any Judge not to discuss any cases?

A. No.
Q. But you knew that this Murphy case was in progress?
A. We finally read it in the paper. I did read it in the paper.

(TR. 324)

Q. What paper was that?
A. The Herald, I believe.
Q. Monday morning?
A. You got me, I don't know.
Q. Do you get the Herald at home, sir?
A. Yes, sir.
Q. And, you read the paper; do you not, sir?
A. I didn't read nothing about this particular case except, I seen the headline.
Q. Do you remember this article (showing a newspaper)?
A. That is just about the height of it.
Q. I see.

• • • • (TR. 325)

Q. You would like to sit in this case, wouldn't you?
A. Not really.
Q. Why not?
A. I think it would be a very hard case to decide on, to be honest with you.
Q. Why, sir?
A. Because I like to be a fair man.
Q. You don't feel that you can be fair because of what you know about Murphy?
A. Basically so, right.
Q. Now, does the name Whiskey Creek murders mean anything to you?
A. I don't think there is anybody in Dade County that that doesn't mean something to.
Q. I agree with you, sir.
Will you tell us what you know about it?
A. Well, everything is vague after this length of time that is involved—but there were a couple of girls that were supposedly murdered by the Defendant.

(TR. 326)

Q. By Murph the Surf, right?
A. Yes.
Q. Do you understand what happened to him as a result of that, sir?
A. I believe he got life imprisonment.
Q. Right.
Does the name Star of India mean anything to you?
A. It's a jewel of some kind that was involved in a robbery of some kind.
Q. Can you connect the defendant with that?
A. I believe so.
I mean, I do not have the details in my mind that I could write a book.

• • • •

(TR. 327)

BY MR. NAGELEY:

Q. Now, tell us, sir, as best you can, what you remember about this particular case, the Wofford robbery case?
A. I really don't. I couldn't like I say, I don't have any real thing in mind, don't really go on anything.
Q. Have you heard any discussions from the other jurors?
A. About the extent of that—some women were assaulted.
Q. I see.
Do you remember anything about Murphy's insanity?
A. It's sort of vague.
Q. Whatever you remember, sir, because I don't remember what happened to me two years ago—
A. I can't say that—recall anything with any definite—

• • • • (TR. 332)

Q. Now, sir, we are in the case of Murph the Surf. The State presents its case, and Murph the Surf does not offer any witnesses, by alibi or by otherwise at the close of the State's case.
Would you tend to find him guilty just because he didn't offer evidence.

A. Well, I am going to have to ask what your defense is going to be?

(TR. 333)

I mean, you are going to have to present some sort of defense. If you are not going to defend a person, defend yourself, you are going to be guilty, naturally.

Q. Now, sir, if a defense is not presented, and if that man charged is a convicted murderer, and a thief who stole the Star of India and he puts on no evidence, you would find him guilty, wouldn't you?

A. I'm afraid so.

• • • • (TR. 334)

Q. Can you put out of your mind the fact that Murphy is a convicted murderer?

A. Of course not.

Q. Now, sir, would you take the fact that he is a convicted murderer and he is a convicted thief in arriving at your verdict?

A. The only thing I can say, I would attempt to give as fair a verdict as I could possibly give the man.

Q. But that thought would still be there?

A. Oh, absolutely.

I am not going to—I don't think anybody could close that out of their mind.

• • • • (TR. 335)

BY MR. JACOBS:

Q. If Judge Stedman charges you what the law is—now, assuming for the purposes of our discussion that you are a juror, right, and Judge Stedman instructs you that you are to judge this case on the facts and the evidence that come from this witness stand, and from the law that His Honor Judge Stedman gives you; and one of the things that His Honor may charge you is, depending upon circumstances, if the Defendant does not take the stand, you are not to hold that against him—all right?

Do you feel that taking these things into consideration, that you could judge this case on the facts and evidence that comes from this witness stand, from the law that His Honor Judge Stedman will give you.

(TR. 336)

A. Absolutely, that's right.

Q. And if you have an opinion now, will you not let that opinion control the evidence that comes from this witness stand, and let your verdict be from what you heard not from the newspaper, but your verdict will be from the evidence and the testimony and the law which Judge Stedman charges you; am I correct in understanding your answer?

A. That's right.

Q. All right, I just want to make sure we understand.

• • • •

EXCERPTS FROM THE TESTIMONY OF ROBERT C. COX, JR.

(TR. 360)

Q. Have you ever heard the name Murf the Surf before?

A. Yes.

Q. Tell us, sir, to the best of your memory—we are not trying to give you a memory test—when you first heard about him and what you know about him.

(TR. 361)

A. Well, I guess the first thing was the jewel robbery.

Q. I see.

A. In New York; and I was not living in Miami at the time, but I just vaguely recall it from reading about it and hearing about it.

The other affair was the Whisky Creek business, and then this case.

Q. Do you know the outcome of the Whisky Creek case?

A. I believe Mr. Murphy was sentenced to life imprisonment in Raiford.

Q. That was for murder, right?

A. Right.

Q. Do you know anything about any securities being involved in those cases?

A. Yes, I do.

Apparently, the two victims were involved with some sort of security theft of some sort.

Q. Do you know the approximate amounts?

(TR. 362)

A. No.

Q. Do you know whether or not Mr. Murphy was charged with any other charges with reference to the theft of securities?

A. No.

Q. Back to the Star of India, do you know what happened to him as a consequence of that affair, whether he was convicted or acquitted or what? Do you know if he was convicted of any other crime, other than the Whisky Creek Murders?

A. No.

Q. Now, divorcing the Whisky Creek murder from your mind, if you can, other than that experience, do you know Mr. Murphy to be a criminal?

A. No, sir; except for this particular case, which as he said, he is presumed innocent.

Q. I see.

This particular case, what do you know about that?

A. Well, just that a home was broken into. I think a boat was pulled up to the backyard, or something like that, and Mr. Murphy was arrested for the case.

(TR. 363)

Q. I see.

Now, if you will, sir, once again repeat—and I am not trying to give you a memory test—are there any other facts you know about this case, just the smallest details, whatever they might be?

A. The only other thing that I know is the business of the sanity versus non-sanity that was at issue in the past.

Q. What you know about that?

A. Well, apparently, sir, Judge Stedman ruled that he was insane; and then, in Broward County, they ruled that he was eligible to stand trial.

Q. All right, thank you.

Now, you were called as a prospective juror on Monday, is that correct, sir?

A. Yes, sir.

Q. Now, at no time between Monday and today have you ever been sworn to secrecy by any Judge, is that right?

(TR. 364)

A. Correct.

Q. No Judge has ever told you you can't discuss any case; is that correct?

A. Right.

Q. Before you came into the room, you knew that this was the Murph the Surf case; did not not?

A. Right.

Q. And how did you happen to know that?

A. I heard it on the news.

Q. When was that, sir?

A. Monday.

Q. And, can you give us a capsule summary of what you remember about the broadcast?

A. As a matter of fact, I heard it on the radio on the way home in the car; and I thought, "Well, I wonder if that is the one I am on," and then in the evening news, it became apparent that it was.

Q. I see.

I would like to show you an article from Monday's Miami Herald and ask you, sir, if you remember this article, "manicured Murphy Stars in Court"?

(TR. 365)

A. Yes.

Q. Did you read that article?

A. Yes, sir.

Q. And, did you get a chance to read the paper yet this morning?

A. I glanced at it, yes.

Q. Did you see this article, "Murphy Jurors Rejected"?

A. Yes.

Q. Did you read it?

A. Yes.

Q. Now, Mr. Cox, when a jury panel meets, they all meet in a given room on this floor; do they not?

A. Yes, sir.

Q. Have you heard the other jurors generally talking about this case?

A. Yes, sir.

Q. Would it be fair to say all of the people have discussed it?

(TR. 366)

A. I didn't hear all of them, just heard a couple of people talking about it.

Q. But in your opinion, does the prospective panel seem to know about this case?

A. Yes, sir.

Q. Now, the State indicated that a man is presumed to be innocent until proven guilty.

Tell us, if you will, sir, if you know a man to be a convicted murderer, and you know a man to have been involved in the theft of the Star of India, and that man was on trial, in your mind, is that presumption of innocence not watered down?

A. Could you give me the last part of that again?

Q. The presumption of innocence is not watered down, diluted?

A. I don't think so.

Q. I see.

Could you give the same and impartial trial to a convicted murderer, to one who was involved in the theft of the Star of India, to one who was known to you as Murph the Surf, as you could some person you had never heard anything about, knew nothing about their criminal background?

(TR. 367-368)

A. Yes, sir.

Q. Now, sir, if you are chosen on this panel, you are a trier of the facts. You are required to exercise your judgment in determining the guilt or innocence of the accused.

Would your judgment be influenced by the fact that you know him to be a convicted murderer and a thief?

A. No, sir.

Q. It would not?

A. No.

Q. Now, when procedurally, the State puts on its case, then we put on our defense, if any, and then, the State rebuts, if they so desire.

In this case, if the State puts on a case and we do not put on a defense, would you hold that against the Defendant?

A. I think I would have to weigh the facts of the case.

EXCERPTS FROM THE TESTIMONY OF CHARLES A. EDMONDS

(TR. 387)

Q. What do you know about Murph the Surf, Mr. Edmonds, please?

A. The Star of something—Whisky Creek murder, and this case you have here.

Q. I see.

We are not trying to give a memory test, but what do you remember about the Whisky Creek murder?

A. I don't know much about it.

Q. Whatever, sir, please tell us.

Take your time.

Do you remember who was murdered, not by name.

A. A couple of girls from California, I believe.

Q. I see.

You connected Murphy with those murders, right?

A. Yes, I believe so.

(TR. 388)

• • • •

Q. Do you know whether Murphy is out on bond or whether he is in jail?

A. I read in the paper he was in Raiford, but I see him here.

• • • • (TR. 389-390)

Q. So, you are presently familiar that Murphy is a convicted felon; right?

A. Right.

Q. Now, do you know whatever happened to that Star of India case?

A. No, I don't know the results of that.

Q. You don't know the specific results, whether he went to jail or not?

A. I believe he did. I couldn't swear to it.

Q. And that also would make him a convict in your mind if in fact he did go to jail.

A. Yes.

Q. Now, you were called as a prospective juror in this case last Monday, is that right?

A. Right.

Q. And nobody ever said, no Judge ever told you you couldn't talk to the other jurors; did they?

A. You mean the people that are with me now, no.

• • • • (TR. 391)

Q. You knew, before you came into this courtroom, that this was going to be the Murph the Surf case; did you not?

A. Yes.

I didn't know Monday. I knew it Tuesday when I read it in the paper, or at least assumed that is what it was.

Q. Did you discuss this; did you hear any of the jurors in the room down there talk about this case?

A. There were some people talking.

Q. And, is it your opinion that the jury panel knew this was going to be the Murph the Surf case?

A. Tuesday, I believe everybody did.

Q. Everybody, right?

A. Everybody.

• • • • (TR. 392)

Q. Now, you have a capsule knowledge of what this case is about today, what it involves?

A. You mean, what happened, why it is a case?

Q. Yes, sir.

A. Faintly, yes.

Q. Tell us, sir.

(TR. 393)

A. The robbery of a home on Miami Beach.

Q. How did you learn that, Mr. Edmonds.

A. From the Herald.

Q. And you read the Herald daily?

A. Yes, sir.

Q. Sir, I show you a Herald article dated Monday, and ask you if you have seen this Article "Manicured Murphy Stars in Court"?

A. Yes, I did.

Q. You read the article?

A. Yes, sir.

Q. Did you read the Herald this morning?

A. Yes, sir.

Q. And, did you see the article, "Murphy Jurors Rejected"?

A. Yes, sir.

Q. Did you read the article?

A. Yes, sir.

• • • • (TR. 398-399)

Q. Now, sir, the answer to this question—and I want soul-searching honesty—isn't it a fact that what you know about Murphy at this time would influence your verdict against him?

A. I expect it would, yes.

Q. Right.

And isn't it also a fact, now, as you sit there, sir, you cannot obliterate or cut out from your memory the fact that you are married; can you?

By the same token, sir, if you were to deliberate on the guilt or innocence of Murphy, you cannot honestly put out the fact that you knew he was a murderer; could you.

A. It would be hard to.

Q. Right.

Even though the Judge says: "Look, you are supposed to only listen to this evidence, just forgetting everything else that happened in your history" even if you were told that, to follow the law, and the law says you only listen to this, you can't put it out of your memory; isn't that a fact, sir?

A. I don't see how you could—influence somebody.

• • • • (TR. 401)

BY MR. JACOBS:

Q. And, if you had any feelings or opinions right now as to the guilt and innocence of this defendant, if you have an opinion now, would you put that opinion aside and give this man a fair trial from the facts and the evidence that comes from this witness stand; can you do that?

A. I could try—I don't know.

I just think it would be some influence from previous—

Q. I appreciate your honesty.

Let me ask you one thing: Do you think your opinion would yield to the facts and the evidence that you hear from the witness stand?

A. It should—I will try.

Q. Are you saying that it won't? Do you have an opinion right now that is so strong that no matter what you heard from the witness stand, it couldn't move it?

A. No, I do not.

Q. If you heard facts and testimony from the witness stand, the opinion that you have, the thoughts that you have, would you put that aside and follow the facts and the evidence and the law, would you, sir?

(TR. 402)

A. I would try; yes, sir.

MR. JACOBS: All right. I object to the challenge.

MR. NAGELEY: There was no challenge made.

BY MR. NAGELEY:

Q. Now, Mr. Edmonds, please believe me, sir, that I am not trying to force you one way or the other. All I want from you is your honest answer.

Now, you stated earlier that you could not eliminate that influence of Murphy and his background from deliberating; is that correct?

A. Right.

Q. And no matter how hard you tried to follow the law, that influence would remain; would it not?

A. It would be hard to shut it out.

• • • •

EXCERPTS FROM TESTIMONY OF EDNA V. TURNDORF

(TR. 407)

A. Well, I read about this case when it happened, at the time, and I am afraid I am prejudiced.

Q. Let me ask you this question.

You have an opinion, I take it from your answer. Would that opinion yield to the testimony and the evidence that comes from that witness stand, or is it so strong that no matter what you heard, you couldn't give this man a fair trial?

A. I am afraid I am prejudiced.

Q. Would the opinion you have yield to evidence from the witness stand?

A. Maybe not.

(TR. 408)

Q. When you say "maybe not", I ask you yes or no.

A. No.

• • • •

EXCERPTS FROM TESTIMONY OF GEORGE A. FOX

(TR. 414)

Q. Tell us what you know about the case, if you will, Mr. Fox.

A. Well, all I know is what I read in the papers.

Q. That is about all I know about it myself.

Tell us what you know, please.

A. I know they caught him around the house, and the woman claimed she was assaulted.

Q. By virtue of the fact that he was caught around the house, that would be a pretty good indication of guilt, right?

A. Well, if he couldn't prove he was somewhere else.

Q. I see.

In effect, what you are saying is, if Murphy doesn't have witnesses take the stand and prove he was someplace else, you would find him guilty; wouldn't you?

(TR. 415)

A. I guess so.

Q. I see.

And, even if you were instructed for hours and days and weeks about following the law, if he didn't take the stand and say, "I was in Opa Locka," you would find him guilty, wouldn't you, if he was found at the scene?

A. Well, if he was found at the scene or close to it, he couldn't say he was in Opa Locka.

* * * *

(TR. 418)

BY MR. NAGELEY:

Q. Did you hear about the Whisky Creek murder?
A. I heard about it.
Q. Did you connect Murphy with that murder?
A. Well, all I done at the time is read about it.

* * * * (TR. 419)

Q. Would the fact of what you know about this case, what you read about it, what you have read, coupled with the facts that he was involved in the murder at Whisky Creek, would that not, sir, influence your verdict.

A. Well, I don't believe that would influence my verdict.

* * * * (TR. 420)

BY MR. NAGELEY:

Q. Now, you were called to jury service on Monday, were you not, sir?
A. Yes.
Q. And you have sat in that room on the Fourth Floor with the other jurors; have you not?
A. Yes.
Q. Before you came to the courtroom today, you knew you were going to be on the Murph the Surf case; did you not?

(TR. 421)

A. Today I did. I didn't Monday.
Q. You discussed this case with other fellow jurors, did you not?
A. No, we haven't discussed it.
Q. You talked about it?

A. Well, all I heard is other people saying what they are here for.
Q. I see.

So, it is your opinion, sir, that the entire panel out there knows about this case?

A. Well, the biggest part of them know about it now.
Q. Do you read the newspapers, sir?
A. Yes.
Q. Do you read the Miami Herald?
A. Yes.
Q. Did you read anything about this case?
A. Well, all I read about it, I was here Monday.

(TR. 422)

Q. Did you read this article, "Manicured Murphy Stars in Court"?
A. I read that.
Q. Then you read that he was a convicted murderer, right?
A. Yes.
Q. You read that he was in Raiford serving life for the murder.
A. Yes.
Q. Did you read that Murphy was convicted of the Star of India theft in New York City; right?
A. Yes.

* * * *

EXCERPTS FROM TESTIMONY OF
PETER CLAYTON

(TR. 436)

Q. Morristown, New Jersey?

Then tell us, sir, being the proximity to the City of New York, whether you have heard of the Star of India, the DiLonge Ruby, the Museum of Natura! History?

A. Yes, I read the papers.
Q. Right.

Do you relate anybody with that, any person with that?

A. Again, through reading the paper.

(TR. 437-438)

Q. Who?
A. Mr. Murphy, I understand.
Q. Right.
Do you know what happened, as far as the consequences of that little caper?
A. I assume he was brought to trial.
I can't say that I know whether he was found guilty or not.
Q. Do you know the name Whisky Creek murders?
A. Yes.
Q. What do you know about them, sir?
A. I understand Mr. Murphy was also connected with that.
Q. Do you know what the outcome of that trial was, insofar as Mr. Murphy was connected?
A. I understand he was found guilty.
Q. Do you know whether he is out on bond or on the street or in jail?
A. I understand he is in jail.
Q. Do you know what kind of sentence he is serving?
A. Life, life sentence.

• • • • (TR. 446)

BY MR. NAGELEY:

Q. Now, you were called here on Monday as a prospective juror; were you not?
A. That's correct.

(TR. 447)

Q. And you sat in that little room down the hall with the other jurors; right?
A. That's right.
Q. Before you came in here, you knew you were on the Murph the Surf case; right?
A. Yes.
Q. And the jurors generally talked about the case; did they not?
A. Some of them did.
Q. And the consensus of opinion was that this was the Murph the Surf case; right?
A. I believe most of them read it in the paper.

Q. Now, did you read the Herald on Monday about "Manicured Star"?
A. I read the paper.
Q. Did you read the article that he was under a life sentence?
A. That's right.
Q. You read about the Star of India?
A. Yes.
Q. That he was in Raiford?

(TR. 448)

How about today; did you read this article today?
A. Yes, I did.
Q. "Murphy Jurors Rejected?"
A. Yes.

• • • • (TR. 451)

Q. Now, sir, you already know that Murphy is a convicted murderer; and that is going to weigh on the jury, is it not, including yourself?
MR. JACOBS: Objection to conclusions.
THE COURT: Sustained to what is going to weigh on the jury.

(TR. 452)

You can ask him about this, but don't ask him about the other jurors.

BY MR. NAGELEY:

Q. Will it weigh on you, sir.
A. Well, I am aware of it.
You asked me a similar question before. As much as possible, I will try to decide this case on the facts that are presented.

• • • •

(TR. 458)

BY MR. NAGELEY:

Q. Now, sir, in complete honesty, isn't it a fact that you could give a fairer and more impartial trial to a person of whom you knew nothing, and of whose criminal background you knew nothing, than you would Murph the Surf?

A. Well, all questions will be answered honestly. I will try to do so, to the best of my ability, if I were selected.

• • • • (TR. 461)

Q. Now, you have heard the fact of his competency or incompetency badgered out in the newspapers?

A. Right.

Q. You have read in the Herald about Murphy being ruled incompetent to stand trial?

A. I know the issue of sanity was brought up.

• • • • (TR. 471)

BY MR. NAGELEY:

Q. Let's go back to the fundamental thing, Mr. Clayton.

I hate to go into philosophy, and how you are going to get the conviction for murder out of your mind when you deliberate.

MR. JACOBS: Repetitious.

THE COURT: Overruled.

You may answer, sir, if you understand it, please.

MR. CLAYTON: That will be in my mind. I will know it.

(TR. 472)

Q. And will it influence your verdict?

A. Let me put it this way: I hope that I will be able to give, to be as fair as possible without letting anything that has happened in the past influence it; and I will know it, so it might influence it somehow.

I don't say that for sure until I am presented with that.

Q. But your present frame of reference, for any posture, you have got to concede, will you not, that it would influence your verdict; that it is part of your judgment, right?

A. That is a difficult question to answer, because I do know it; but you could say that everything that I know might influence my judgment.

Q. Now, sir, even though Murphy will offer no defense witnesses as to the issue of guilt or innocence—strike that.

(TR. 473)

Sir, at the time that you deliberate with your fellow jurors, if there was a close question of fact as to guilt or innocence, wouldn't the fact that you knew he was a convicted murderer and a jewel thief sway you to believe that he was guilty?

A. No.

Q. But it would influence you?

A. Yes.

MR. NAGELEY: Challenge for cause.

BY MR. JACOBS: Excuse me. Just one or two points. You say that it would influence you only to the extent that you know of it?

A. That's right.

Q. But you could judge this case on the testimony and the evidence and the law that the Judge will charge you?

A. That's right.

Q. Other than having these matters in your subconscious, so to speak, knowing about that, you would not allow these matters to influence your decision?

(TR. 474)

A. I would certainly try not to.

Q. When you say, "Certainly try not to," at this point you feel that you could give this man a fair trial, and not allow these other matters brought up to influence your verdict?

A. Yes.

Q. When did you go to law school, sir?

A. 1967.

Q. Where was this.

A. Rutgers Law School.

MR. JACOBS: No further questions. We object to the challenge for cause.

THE COURT: Denied for cause.

MR. NAGELEY: Preemptory challenge.

• • • •

EXCERPTS FROM THE TESTIMONY OF PATRICIA A. ESHER

(TR. 479-480)

Q. Mrs. Esher, this case has attracted a considerable amount of publicity in the news media. You might have heard about it or you might have heard it on the radio or saw something about it on television—where the State alleges that this defendant with others broke into the home of Mrs. Olive Wofford on Miami Beach and made an assault upon several women in this home and committed the crime of robbery.

An A.D.T. silent alarm went off at the Miami Beach Police Station and as a result of this the police came and caught the defendant and other people—shortly—within a short distance away from the home.

Do you remember reading anything or hearing anything about this?

A. Oh, yes, I've heard it but I did not read the details of it, because I skipped over it.

* * * * (TR. 487)

Q. You were called here as a juror on Monday?

A. Right.

Q. And during that period of time you have sat in the jury room back there, have you not?

A. Yes.

Q. Everything said in that room, you knew before you came in here today—that this was the Murf the Surf case?

(TR. 488)

A. Right.

Q. And you learned that because of the discussion back there in the jury room; did you not?

A. Actually, I learned it because my husband told me from hearing it on the radio.

Q. What did he tell you, ma'am?

A. He just asked me if I realized that this was the case this jury was for.

Q. You have not sworn to secrecy, not sworn, not to talk about this case to any one person on this jury panel; have you?

A. No.

Q. So, while you were in there and the other jurors were in there, you enjoyed the freedom of speech?

A. Right.

Q. You heard people discussing this case in that jury room; did you not?

A. Yes.

Q. And in fact, you heard certain persons make opinions about the case; did you not?

(TR. 489)

A. Yes, sir.

Q. And in fact, you heard some people express an opinion that Murphy was guilty of the crime?

A. I also heard the opposite.

Q. How many persons did you hear say that Murphy was guilty of the crime?

A. Well, there was one woman back there, very adamantly wanted to get out of it.

Q. What did she say, the best that you can recall?

A. That she thought it was a waste of time and might as well not have it, and therefore we might as well all go home.

Q. That it was a waste of time to go through this trial?

A. Yes.

Q. Now, when did you first learn from your husband that this was the Murph the Surf case?

A. On Monday night.

(TR. 490)

Q. Have you heard any news about the case on TV or radio or in the newspaper?

A. I have not read or paid much attention to it, and specifically, this week, I have not read it.

When I saw the headlines, that's all. I just read the headlines. I didn't read what was underneath.

* * * * (TR. 492)

Q. When did you first hear the name, ma'am, of Murf the Surf?

A. Oh, it was a long time ago, but I don't know.

Q. Now, would you tell us what you know about the name?

A. Other than that they called him Murph the Surf because he worked on the Beach and was a surfer.

• • • • (TR. 494)

Q. Now, when you say that you have already heard the name of Murph the Surf, does that denote to you, or connote to you, a minister, a physician, a plumber, a mathematician, criminal, a boat captain, or what?

A. Well, it would denote surfing.

Q. You don't associate him with crime?

A. I do now.

Q. Now—at what point forward?

A. I imagine it was from the jewelry problem.

Q. That was a robbery in what city; was it New York City?

(TR. 495)

A. New York, I think.

Q. Do you recall the name of the jewels.

A. Well, I know it was the Star of India.

Q. Right.

Now, since that time, you have regarded him as a criminal, as well as a surfer?

A. Well, I assumed that the Court sentence was proper. If it wasn't, it would be a shame.

Q. It sure is.

Now, the words "Whisky Creek Murders"—does that mean anything to you?

A. Yes.

Q. What do those words mean to you?

A. The Whisky Creek trial, and now he is serving time.

Q. You knew before you came in here that he is serving life for murder?

A. Yes.

(TR. 496)

Q. Have you heard anything at all about his sanity or insanity?

A. If I remember correctly, he was not granted the privilege to be called insane.

Q. And that was in the Whisky Creek Murder?

A. Yes.

• • • • (TR. 501)

A. The only thing that would cause me to think that he is guilty of that particular thing is if it had been proven.

Q. You would not take into account the fact that he did not take the stand?

A. No, I don't believe that that would have anything to do with it.

(TR. 502)

• • • •

A. Because it has always appeared to me, and I have been taught, that I think, that the case has to be established against someone.

Q. Now, assuming an individual whom you had never heard of and you knew nothing about their background, maybe Joe Jones or John Smith was on trial for the same offense charged here, could you give Murphy the same fair and impartial trial that you could give that person that you had never heard about?

A. Yes, sir.

Q. Could you?

A. Yes, sir.

Q. You know that he is a convicted murderer?

A. Yes.

Q. You know he is a jewel thief?

A. Right.

Q. And it is your statement that you can give Murph the Surf the same fair and impartial trial that you could give anybody you never heard of?

(TR. 503)

• • • •

Q. Would the fact that he was a convicted murderer, or the fact that he was a convicted jewel thief tend to influence your verdict.

A. I would think so and I will tell you why. Because, as the mother of three boys, once somebody has become involved in something, it is a very natural thing for people thereafter to immediately pick on one who has already been involved in something.

(TR. 504)

Q. I don't understand your analogy, ma'am.
A. A child who has been in trouble, everything that comes down the wire, immediately out of that, people single him out.
Q. Now, would the fact that he had been convicted tend to influence your verdict?
A. Not in this case.
Q. Not at all.
A. No.

(TR. 505)

• • • •

Q. Would you tell us ma'am, how you keep from taking that into consideration—into the jury room?
A. I think that I am an intelligent enough person to do that.

• • • • (TR. 522)

Q. Ma'am, do you believe that a person who was found at the scene of the Wofford robbery, who offers no defense, who is a convicted murderer, a convicted jewelry thief, and who is found on the scene, should be afforded constitutional protection?
A. Yes.

• • • •

(TR. 524)

Q. Do you have a TV set in your home?
A. Yes.
Q. And you have heard on the news media about Mr. Surf over the last few years?
A. Yes.

(TR. 525)

Q. Do you get the newspaper in your home?
A. Yes.
Q. What daily do you get in your home?
A. I get both of them.
Q. You mean the Miami News and the Miami Herald?
A. Yes.
Q. Have you read any articles about Murph the Surf in the newspapers?
A. Yes, sir.

Q. Do you remember, specifically, ma'am, the copyrighted articles that appeared in the Miami News about a year ago by Milton Sossin, which were long articles about his life?
A. No.
Q. Now, there is an article that appeared on Monday of this week in the Miami News, and I ask you if you saw the article?
A. Yes.
Q. Did you read the article?

(TR. 526)

A. Yes.
Q. You know from that article—any prior experience that you may have had—about Murphy being convicted of life, reinforced from that article?
In other words, it fortified your memory of Murphy, did it not?
A. You mean as far as his convictions?
Q. Yes, about his past experience.
A. I don't think that I needed my memory fortified.
Q. This article appeared on Thursday, as to why the jurors were rejected; did you see that one?
A. No.
Q. And, how about this one today, where it states that the defense challenges the jury—in the Murphy jury trial; did you see that one?
A. I saw the headlines.

• • • • (TR. 563)

Q. Mrs. Esher, did you say you received a newspaper in your home; you get a Herald delivered, a newspaper?
A. Yes, sir.
Q. Which paper is that?
A. Both of them.
Q. The Herald and the News?
A. Yes.
Q. Did you have occasion to read the Sunday News or Herald?
A. Yes.
Q. Did you read the article connected with this case?

(TR. 564)

A. I didn't see one. I saw one about the Judge.
Q. Did you see one with your name in it?
A. No.
Q. Did you receive any phone calls from any friends or neighbors telling you about an article with your name on it?
A. Yes.
Q. Just so I have it clear in my own mind on this, you said you learned that Mr. Murphy has a record from the newspapers and the radio, and from what you overheard from other jurors; is that right?
A. Yes.
Q. Not from what you learned in court here Friday?
A. Except about this particular case.

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EXCERPTS FROM TESTIMONY OF
FRANK G. CALE

(TR. 576)

Q. Mr. Cale, this case has attracted a considerable amount of publicity in the various news media when it occurred back in January of 1968.

This is the case where the State has alleged that the home of Mrs. Olive Wofford on Miami Beach on Pine Tree Drive was broken and entered by this defendant as well as several others.

While they were there, one of them made an assault upon several women in the house, and committed the crime of robbery.

An automatic ADT alarm, a silent alarm, was set off, and the police came shortly thereafter and caught this defendant and the other people within a short distance away.

Do you remember reading anything or hearing anything in the news media, anything that would present you from giving this man a fair trial?

A. It's been publicized too much, I have been talking about the case with many people, read about it.

(TR. 577)

Q. Mr. Cale, I am not arguing with you. I am not trying to fight with you.
A. I understand.
Q. All I want to know is if you feel—and you are the only one that can tell me—I know there has been a great deal of publicity; but my question is:

Would you listen to the facts and the evidence from the witness stand, and the law that Judge Stedman will give you, and let that control your verdict?
A. Possibly, but I don't know.

There is too much I have read and heard about it.
Q. You feel what opinions you have, you could not let them yield to the evidence in this case?
A. Let me say, I will favor the prosecution's side, but not the defense side.
Q. When you say favor, you are saying that no matter what comes from the witness stand, that you could not give this man a fair trial?

(TR. 578)

A. Unless something different than I have heard before.
Q. Let me word it this way:

You have read a great deal about this?
A. Right, and talked about it.
Q. And talked about it.

But a verdict that comes from the jury is a verdict that comes from the evidence.

Now, will you let that verdict depend upon whatever evidence comes from the witness stand, and the law that Judge Stedman gives you?
A. It would have to be different than what I have heard.
Q. Will you let the evidence and the law determine your verdict?
A. If it was different, yes, I would.

MR. JACOBS: You may inquire.

BY MR. SWICKLE:

Q. Sir, you have a definite opinion about Mr. Murphy's guilt?

(TR. 579)

A. Right now, yes.

Q. What is that opinion, sir?
A. Guilty.
Q. You have that opinion right now?
No matter what you heard from that stand, could you set that opinion aside?
A. Like I tried to tell the prosecutor, I doubt it.
Q. You doubt it?
How long have you been back there with those other jurors, sir?
A. Since last Monday.
Q. Now, you know, no one has instructed you not to talk about this case.
A. No, sir.
Q. Have you discussed this case back there with the other jurors?
A. Quite a bit.
Q. So, there has been discussion there among these people—they know why they are here?
A. Right.

(TR. 580)

Q. Have they been discussing their views and feelings about this case.
A. Yes, they have.
Q. This is being done by the majority of the panel?
MR. JACOBS: Objection. This does not go to the qualifications of this man, what the rest of the people do.
MR. SWICKLE: Judge, it goes to the motion for change of venue.
THE COURT: All right, overruled.

BY MR. SWICKLE:

Q. When you say, "the people have spoken" do you mean that the majority of the people back there have formed an opinion about this case and about Mr. Murphy?
A. The majority.
Q. What would that opinion be?
A. Guilty.

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(TR. 581)

BY MR. JACOBS:

Q. Mr. Cale, in our society, it is almost impossible not to hear anything about a case that is publicized.
But my question is: The verdict that you return, would you let that be determined by what comes from this witness stand?
A. Well, the way I feel, I already know most of the evidence just by reading and hearing about it, and only substantially what I believe.
Q. If that was different, Mr. Cale, would you follow it?
A. The defense would have to prove him innocent.
Q. It is not the defense's duty; it is the State's duty to prove the defendant guilty beyond and to the exclusion of every reasonable doubt.
If you hear Judge Stedman instruct you that this is the law, will you follow it?

(TR. 582)

A. If he were to instruct me so, yes.
Q. Now, this is the law in our State; that the Defendant in every criminal case is presumed innocent. The law doesn't say he is absolutely innocent; but every man that is charged with a crime is presumed innocent.
Will you give this defendant the benefit of that presumption of innocence?
If Judge Stedman charges you that this presumption of innocence remains with the defendant, would you follow it?
A. I would have to.
Q. Now, knowing something about the law as I have just mentioned it, would you base your verdict on the testimony and the evidence that comes from this witness stand?
A. Yes, I would.
Q. If you have an opinion, will you let that opinion yield to the testimony and the evidence and the law that His Honor states?
A. I can't really answer that.
MR. SWICKLE: We renew our Motion for Cause.

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EXCERPTS FROM THE TESTIMONY OF DENNIS EDWARDS

(TR. 586)

Q. Mr. Edwards, this case attracted a great deal of publicity in the news media. You might have read about it.

This is where the home of Mrs. Olive Wofford on Miami Beach was broken and entered into by this defendant and several others; and while inside the home of Mrs. Wofford, she and several other women were assaulted.

The home had what we can an ADT, an automatic silent alarm, which was set off.

(TR. 587)

The police were called and came a few minutes later and caught this defendant and a few others within a short distance away from the crime.

Do you remember hearing anything about this or reading about it?

A. Yes, sir; I read about it in the newspapers, and saw it on television.

Q. The question I want to ask you, with all your education, can you give this man, will you give this man a fair trial?

A. I don't think I could give him a fair trial.

Q. Why is that, sir?

A. Before that, he was involved in two previous crimes, and I'm afraid this will prejudice me against him.

Q. Mr. Edwards, let me ask you this:

I appreciate your candor, but if you have an opinion, will you let that opinion yield to the testimony and the evidence that comes from this witness stand, and the law that Judge Stedman will give you?

(TR. 588)

Will you let your verdict be based on the testimony and the evidence and the law?

I don't know whether I can do it.

Like I said, the defendant, the news media, so far—made me prejudiced towards this defendant.

Q. I can appreciate that case did get a lot of attention.

Will that prejudice you so materially that what you hear from this witness stand, you couldn't let that determine your verdict?

A. I think so.

MR. JACOBS: Go ahead.

BY MR. SWICKLE:

Q. Sir, you said you formed a definite opinion about Mr. Murphy's guilt or innocence in this case?

A. Yes, I have.

Q. What is that opinion?

A. I think he is guilty.

(TR. 589)

Q. What do you base that opinion on, sir?

A. From his other episodes.

Q. Which would be what?

A. The Whisky Creek murder case, the Star of India jewelry theft.

Q. How did you learn about those cases?

A. I learned about those cases in the news media—newspapers and TV, radio.

Q. And you cannot set that opinion aside; is that correct?

A. I don't think so.

Q. Sir, how long have you been back there in the hall with the jurors?

A. This is my sixth day.

Q. Now, you haven't cautioned been cautioned by anyone not to discuss this case?

A. No, I haven't.

Q. Now while you were back there, did you discuss this case, or was there any discussion going on with the other members of the panel about this case?

(TR. 590)

A. In some instances.

Q. Do they pretty much know why they are here, what case they are going to sit on if they are selected?

A. Yes, they do; most of them do.

Q. Have you heard anybody back there formulate any opinions about Mr. Murphy's guilt or innocence, or discuss his background?

A. Well, on some occasions, yes.

Q. Has anybody expressed to you, or to anybody sitting next to you so you could hear, an opinion as to whether Mr. Murphy is guilty of this by his mere past record, his mere past crimes?

A. No, but I guess it's implied.

MR. SWICKLE: We move to excuse the juror for cause.

THE COURT: Does the State have anything?

MR. JACOBS: No, Your Honor.

THE COURT: Granted.

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EXCERPTS FROM THE TESTIMONY OF ROBERT M. FLEMING

(TR. 593)

Q. Mr. Fleming, this case attracted a great deal of publicity in the news media when it occurred in January of 1968.

(TR. 594)

The State alleges that this defendant, Jack Roland Murphy, and others broke and entered the home of Mrs. Olive Wofford on Miami Beach on Pine Tree Drive; and while inside, made an assault upon several women lawfully within this home, and also committed the crime of robbery.

An automatic ADT alarm, a silent alarm which was in the house, was set off. The police came and caught everybody within a relatively short distance away from the house.

Have you read anything about this in the news media?

A. Who hasn't?

Q. Will you judge this case on the testimony and the evidence and the law that Judge Stedman will instruct the jury, and give this defendant as well as the people of our state a fair trial?

A. I would attempt to, sir, but I am afraid I would be biased.

Q. Because of what you have read in the paper?

A. That's right.

Q. Let me ask you this:

(TR. 595)

You have certain feelings, I take it, from what you read in the paper?

A. Yes.

Q. Would you let these feelings yield to the testimony and the evidence and the law that comes from this witness stand, and the law that comes from His Honor?

If you have certain feelings and you hear the evidence, will you allow these feelings to yield to the evidence and the law and base your verdict on that?

A. I would attempt not to let them bias me, but I am a human being.

Q. I appreciate that, sir; but other than the human quality that we all have, having read this and formed an opinion, if you have an opinion, will you let that yield to the testimony and the evidence?

A. It's kind of difficult to answer, because as I say, I am a human being.

I am sure it will have some bearing on it, regardless of what is said in this Court.

Q. Do you feel that your feelings are so strong sir, that no matter what the evidence that comes from this witness stand, no matter what the law that Judge Stedman instructs you, you could not give this Defendant a fair trial?

(TR. 596)

A. I doubt it.

MR. JACOBS: You may inquire.

BY MR. SWICKLE:

Q. Sir, you have formed an opinion as to Mr. Murphy's guilt or innocence in this case, based upon what you know?

A. From what I read in the newspaper?

Q. From what you read in the newspaper?

A. That's right.

Q. What is that opinion at this time?

A. The man is guilty.

Q. Do you know anything about Mr. Murphy's past record?

A. Only what I have read in the newspaper, seen on television and radio.

Q. Will you tell us briefly what you have learned about Mr. Murphy's past?

(TR. 597)

A. He is a bad character.

Q. Pardon me?

A. He is a bad character.

He has committed robberies, committed murder.

Q. What murders are you talking about?

A. The Whisky Creek murder.

Q. You found that out in the news media?

A. Yes.

Q. You know the result of that case that was up in Broward County, the outcome of that case from what you have read?

A. No, I don't think I do, sir, because I kind of got a little sick of it.

Q. Sir, you have been back there what, now, six days?

A. Since last Monday at 11:00 o'clock.

Q. Now, no one has cautioned you not to discuss this cause as of yet; you haven't gotten any cautions, where the Judge told you and your fellow jurors not to discuss this matter back there, so have you heard discussions concerning Mr. Murphy?

(TR. 598)

A. There have been some discussions, yes, sir.

Q. Have you heard anybody back there now, who is back there now, remaining on the panel, set forth an opinion, as to Mr. Murphy's guilt or innocence?

A. Some of them say so, yes.

Q. What were those opinions?

A. Put him in jail and throw away the key.

Q. Would you say that is the consensus of opinion of the people back there now?

A. Yes.

MR. SWICKLE: I have no further questions.

Move to excuse this juror for cause.

EXCERPTS FROM THE TESTIMONY OF ESTELLE SASLOE

(TR. 601)

A. I am a homemaker, and one of the unloved ladies of the Crime Commission.

Q. Mrs. Sasloe, in every criminal case, as you probably know, the Defendant comes into Court presumed innocent. This is the law.

Will you give this defendant, Jack Roland Murphy, the benefit of this presumption?

A. I don't think I can because of all that I have read and heard about him.

Q. Ma'am, do you have an opinion that right now, you can absolutely say that this opinion would not yield to the testimony and the evidence which comes from this witness stand?

A. I don't think so, because I don't know any thing about this particular case.

Q. All right.

Then, if you are selected as a juror, will you base your verdict in this particular case on the evidence and testimony, and the law that Judge Stedman will charge you?

A. I think I would try.

(TR. 602)

Q. You are the only one that can answer that, so I have to pursue this a bit. You don't have an opinion in this case?

A. Not this particular case, no.

Q. In your verdict in this case, will you base that verdict on what you hear from the witness stand?

A. It's hard to answer. I guess I would try.

That's all I can say. I am prejudiced by what I have read and seen and heard.

Q. Would those opinions you have—to use your words, the prejudice that you have—yield to the testimony and evidence that you heard? Would you allow that to determine your verdict?

A. I can't answer that.

Q. Well, would the opinions you have be so strong that no matter what the evidence, that you wouldn't let that opinion yield to the evidence?

A. No, I don't think it is that strong that it wouldn't yield.

(TR. 603)

Q. So, you would then, if you have an opinion allow that opinion to yield to the testimony and the evidence from this witness stand?

A. I think so, yes.

Q. When you say "think so" I realize that is a figure of speech most people use—"I think so, I believe".

But will you let your verdict be determined from the witness stand on the testimony and the evidence and the law Judge Stedman will instruct you.

A. I have to say yes.

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BY MR. SWICKLE:

(TR. 607)

Q. Ma'am, Mr. Jacobs asked you if you will give Mr. Murphy the presumption of innocence; and you said, "In this case, I think I can".

Would you explain that, please.

A. Well, because I don't remember anything about this particular case. That is the only reason that I am saying it.

I am saying that I am prejudiced because of the things which I have read and heard.

Q. What have you read and heard?

A. Well, the fact that this man is now serving a sentence makes me prejudiced.

(TR. 608)

Q. A sentence for what?

A. Murder, I think. I am not too sure.

Q. And you say you are prejudiced at this time against Mr. Murphy?

A. Yes.

Q. Having that prejudice, could you, in fact, give him the presumption of innocence?

A. Well, I tried to say that I don't know. I think I would try, but I don't know.

Q. All right.

You don't know, but you won't know until this case is over; will you?

A. Probably not.

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Q. Ma'am, do you receive any newspapers in your home?

(TR. 609)

A. Yes.

Q. What papers?

A. The Herald.

Q. And in that Herald that you receive in your home, have you read anything in the paper concerning Mr. Murphy.

A. Yes.

Q. Would you relate to us what you know, everything, just in brief?

A. Well, lately, everything in the paper has been about choosing a jury for this trial.

Q. Let's go back a little bit.

Did you read anything in the paper concerning what you described before, the murder of some people—you mentioned that before—conviction for murder.

A. Yes, of course, I remember seeing things in the paper about that murder. What details, I don't remember.

Q. But you remember the outcome of that case; did you not?

A. Yes, sir. I know that he was serving a sentence of life for murder.

(TR. 610)

Q. Now going a little bit further back, do you know of any other of Mr. Murphy's exploits prior to the alleged murder?

A. I know that there was a robbery. I know that he has a long history; but in detail, I don't remember.

Q. But that would prejudice you in sitting and listening to these facts; is that correct?

A. If I had to judge anyone who is already serving time for various things, naturally I would be prejudiced.

Q. Now, ma'am, despite what Mr. Jacobs would like you to believe, do you think that you could consider the facts of this case without taking into consideration all of the other knowledge you have about Mr. Murphy?

A. I don't know. I have never been put in this position; but I don't know.

Q. You are the only one that can answer that. I would sure hate to wait until the end of the trial to find out.

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(TR. 612)

MR. SWICKLE: I will rephrase it.

BY MR. SWICKLE:

Q. Is it my understanding ma'am, that you do not know at this time whether you could consider the facts of this case without taking into consideration your prior knowledge of Mr. Murphy?

A. Well, I understand that when you are judging a case, you are supposed to consider just the things that are presented in the court.

I would not swear to you under oath that this is what I would do. I don't know; I have never been in this position.

If this were someone of whom I had never heard about, maybe I could do this.

I don't know.

MR. SWICKLE: Move to excuse this lady for cause, Judge. She said she doesn't know.

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EXCERPTS FROM THE TESTIMONY OF JAMES COLLINS

(TR. 617)

Q. Now, this case has had a great deal of publicity in the news media. This case we are hearing is the Wofford break-in and robbery on Miami Beach on Pine Tree Drive.

The defendant and others allegedly broke in, made an assault on several women, set on an ADT alarm, and the police arrived and the defendant and others were caught within a short distance away.

(TR. 618)

Have you read anything about this that would prevent you from giving this man a fair trial?

A. No.

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(TR. 624)

Q. Did you read the newspapers, sir?

A. Yes, sir.

Q. What papers do you read?

A. Primarily, the Miami Herald.

Q. Did you ever read anything in the Miami Herald about Mr. Murphy?

A. Yes, sir.

Q. What did you read?

A. Several years ago, something about the Star of India; again, approximately several years ago, something about a Whisky Creek episode.

Q. What else did you read about the Star of India? Did you read about the outcome of this case?

A. No, I don't recall the outcome.

Q. Do you recall the outcome of the Whisky Creek murder?

A. Not from reading it in the newspaper, no.

Q. From how?

A. From conversation since my being called as a prospective juror, I have been informed that Mr. Murphy has been found guilty, and is serving a sentence at Raiford.

(TR. 625)

Q. Who informed you?

A. People at work in relation to why I am out of work, I am down here.

Later, I believe it was the second day, the Clerk informed us what specific hearing we were being called for, and so on.

Q. How about the people back in the jury room; have they been discussing this?

A. Yes.

Q. Did you learn from them that Murphy had been convicted of murder?

A. Yes.

Q. The people back in the jury room, some of them, or a majority of them, or any one of them, informed you of an opinion about Mr. Murphy in general?

A. I don't know if you call it an opinion. It would be rather many of them are perturbed due to the lack of speed of being called for questioning.

(TR. 626)

Q. While you have been back there, have any of them, have you heard anybody or discussed with anybody the fact that they formed an opinion about Mr. Murphy's guilt in this case?

A. No.

I've heard people state that they would just as soon not serve on the jury.

Q. Do you have a TV in your home?

A. No, I do not.

Q. Do you own an automibel?

A. No, I do not. I have a company car.

Q. Does that car have a radio on it?

A. Yes, sir; it does.

Q. Do you listen to the radio news broadcasts?

A. Yes, sir.

Q. Did you ever hear anything on the news broadcasts about Mr. Murphy?

A. Yes, the last was last Monday. I believe—something about the trial had commenced.

Q. Do you consider yourself well informed on current news events, news in general in Dade County?

(TR. 627)

A. In Dade County, not particularly.

Q. Or on a national level?

A. More so, yes.

Q. Have you formed an opinion from what you know of Mr. Murphy's past background?

A. No, sir.

Q. I didn't finish the question.

Did you form an opinion about Mr. Murphy's guilt or innocence, based upon his past background, in this case?

A. No, sir.

Q. Do you think that by listening to the facts of this case, you would take into consideration what you know of his past background?

A. No, sir.

Q. That wouldn't enter into your mind at all?

A. Not at all.

Q. Would you tell me how you could put that aside, put that out of your mind and not consider it?

(TR. 628)

MR. JACOBS: Objection.

MR. SWICKLE: —if it doesn't come from the witness stand?

THE COURT: Overruled.

MR. COLLINS: I don't believe that either situation is connected. I don't believe in guilt by association, and things along this line.

BY MR. SWICKLE:

Q. But assuming for the sake of this questioning that you didn't hear anything from the witness stand concerning Mr. Murphy's past criminal record, how could you keep from considering that when you already know of it, when you are making your deliberations in the jury room?

A. As I jsut stated, I don't think it is connected with it.

Q. I agree it is not connected.

How do you keep from considering it when you know of it?

A. I would say just through moral honesty.

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(TR. 632)

Q. Sir, do you have any knowledge, whether associated or otherwise, of others having been tried for this offense?

A. No, sir.
Q. You have no knowledge whatsoever?
A. No.
Q. Other than what Mr. Jacobs has informed you about a few minutes ago, you tell me what knowledge you have of this case, what you have read, what you have heard, whatever it may be.
A. As I stated, most of my knowledge has come not from what I have read; in fact, I will go so far as to say I have purposely avoided trying to read about this.
Q. Why?
A. Because I assumed that this would be one of the questions you would ask or I would be asked.
Q. Would you also have avoided reading for fear of prejudicing yourself?
A. No.
In matters of this type, when I read a newspaper with perhaps somewhat bizarre, flashy headlines, I might skim it just to get the gist, but I don't read it for content as I would, say, something about the Middle East crisis.

(TR. 633)

Q. So then, I am safe in stating that in my own mind, even though you have read or heard about Mr. Murphy's past exploits, it is your testimony that—it is your statement that you are not in the least way prejudiced against Mr. Murphy at this time?
A. That's correct.
Q. You could just judge him as you would any other individual known or unknown to you?
A. Yes, sir.

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(TR. 635)

Have you ever read anything in the newspapers or news media, or heard anything on TV concerning Mr. Murphy's sanity or insanity, or legal competency?
A. Yes, I believe it was something in regard to the Whisky Creek episode; but again, I don't know the outcome of whether they approved, disapproved, or what.

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EXCERPTS FROM THE TESTIMONY OF JOHN PERRARO

(TR. 652)

BY MR. SWICKLE:

Q. Sir, have you read about Mr. Murphy?
A. Yep.
Q. What have you read about him?
A. Oh, a hundred and one things about him that went on.

(TR. 653)

Q. Just briefly—
A. Murder, the Sapphire—what do you call it—the diamond.
Q. Do you know if he has ever been convicted of any of these crimes from what you have read or heard?
A. Yes, I heard of the convictions.
I don't know if he had been convicted; I heard of them.
Q. You learned through the news media; is that it?
A. News, television, everything.
Q. You have been back there six days, now?
A. Yep.
Q. Have you had an opportunity to discuss this case with your fellow prospective jurors?
A. Back there, we just talk on and on.
Q. You just talk on and on.
Has anyone voiced any opinions about Mr. Murphy's guilt or innocence, his past record, whatever it may be?

(TR. 654)

A. Oh, yeh.
Q. Pretty much the topic of conversation back there?
A. Pretty much.
Q. Have you formed an opinion about Mr. Murphy's guilt or innocence, based on what you have already read and what you have already heard?
A. I have had that a long time.
Q. What is your opinion, sir?
A. I figure he was guilty all along.
MR. SWICKLE: Move to excuse for cause.

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EXCERPTS FROM THE TESTIMONY OF RICHARD FINE

(TR. 657)

BY MR. JACOBS:

Q. Mr. Fine, in every criminal case, the defendant enters the case clothed with the presumption of innocence.

This innocence is not a fact, absolute; it is a presumption of innocence.

Will you give this defendant the benefit of that presumption, if His Honor, Judge Stedman says that this is the law?

A. Well, I don't know. I feel I have already formed an opinion about that, if this is what you are asking me.

Q. Well, not at this point.

I am going to ask you that in a second.

Judge Stedman will charge you that every defendant comes into court presumed innocent—presumed innocent.

Will you give this defendant, Jack Murphy, the benefit of that presumption of innocence.

A. I don't think so.

Q. You say you have an opinion in this case?

(TR. 658)

A. Yes.

Q. Would that opinion yield to the testimony and the evidence that comes from this witness stand, or is it so strong that no matter what the evidence produced, you could not give this man a fair trial?

A. It is sort of—I could not give this man a fair trial.

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EXCERPTS FROM THE TESTIMONY OF ESSIE SCHWEID

(TR. 664)

BY MR. SWICKLE:

Q. Have you ever read anything about Mr. Murphy in the newspapers?

A. When I came to court, in the court room during the last week, they mentioned it.

Q. Who is "they"?

A. People. I saw the paper in the court room.

Q. Have the prospective jurors back there been talking about it?

A. We don't talk.

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(TR. 666)

Q. Do you know from the newspapers and the TV whether you have ever heard that he has been convicted of a crime?

A. I heard he was convicted, but I also feel it's two sides to every story.

Q. But, you have heard that he has been convicted of something?

A. Yes, I heard he has been convicted.

Q. Of what, do you know what that would be?

A. Of a lot of things. I don't know off hand. It would be anything, could be anything.

(TR. 667)

Q. Do you know anything—any of the crimes he has committed that you have read about and that he has been convicted of?

A. Well, I don't know if he was convicted of it, but —he gave back the jewelry.

Q. You are referring to the robbery or something in New York?

A. Yes.

Q. And he gave the jewelry?

A. He gave it back.

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EXCERPTS FROM THE TESTIMONY OF DANIEL ELSON

(TR. 706)

Q. If Judge Stedman instructs you as I have just explained, will you follow his instructions as to the law?

A. It might be difficult.

Q. Because of the publicity regarding this case?

A. Yes. I have read quite a bit about this man.

Q. If you are selected as a juror, will you judge this case here on the evidence and the testimony and the law that you hear from this witness stand if you are selected as a juror?

Let me ask you this: Do you have an opinion that is so strong that no matter what the evidence produces, you can't follow the evidence and the law and give this man a fair trial.

(TR. 707)

A. I think that man is guilty.

Q. All right, I appreciate your candor.

But would you allow your opinion to yield to the evidence, the testimony and the evidence and the law that comes from this witness stand?

A. It would have to be very, very strong.

Q. Well, when you say, "it is strong" the defendant does not have to testify in any criminal case.

He may stand on his privilege and not testify and the State still has to prove his guilt to you. You are the only one that can answer that question—will you answer that question that I have asked you?

We have to receive an answer one way or the other.

I am not trying to change your mind, but would you, if you are selected as a juror, give this man a fair trial based upon the testimony and the evidence and the law?

(TR. 708)

A. I think I would find it very difficult to find him anything but guilty.

What I am trying to say is, if you fail to show something that I thought existed, I would be inclined to follow my belief that he is guilty.

MR. JACOBS: You may inquire, sir.

BY MR. SWICKLE:

Q. Sir, do you have an opinion of Mr. Murphy's guilt or innocence right now?

A. Yes, I have.

Q. What is that opinion.

A. I think he is guilty.

Q. What is that opinion predicated upon?

A. Oh, everything I read in the newspapers and as to his involvement in this crime and other crimes.

(TR. 709)

Q. You have been in the jury room this last week; is that correct?

A. Yes.

Q. Has this case been discussed back there by members of the jury panel?

A. It has been.

Q. Has anybody formulated any opinions about Mr. Murphy's guilt or innocence or involvement in this crime back there?

A. I don't think they have formulated anything back there. We have discussed it back there.

Q. Pretty much discussed pretty well between all the jurors, hasn't it?

A. Well, I wouldn't know about all the jurors, but among several that I talked to.

MR. SWICKLE: All right, move to excuse this gentleman for cause.

THE COURT: Granted.

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EXCERPTS FROM THE TESTIMONY OF PHYLLIS TRACY

(TR. 716-717)

BY MR. JACOBS:

Q. You say you have read about this case?

A. Yes.

Q. Will you give this defendant a fair trial?

A. Well, I don't know. I am not real sure.

Q. Let me ask you this:

You have certain feelings because of what you read in the news media?

A. Yes, of this case that you are talking about.

Q. Or other cases—do you have feelings that are so strong that no matter what the evidence was, you would be totally unable to give this defendant a fair trial?

A. I think I would be.

Q. Do you feel, if you have an opinion, you wouldn't allow this to yield to the evidence and testimony?
A. I would like to think that I would, but I couldn't be sure that I would.
MR. JACOBS: All right, ma'am, thank you.

(TR. 718)

BY MR. SWICKLE:

Q. Ma'am, have you formed an opinion as to Mr. Murphy's guilt or innocence in this case?
A. Not in this particular case.
Q. Have you read any articles concerning Mr. Murphy in other cases?
A. Yes, I have.
Q. What other cases?
A. I know he is a convicted murderer.
Q. With reference to which case?
A. Two women—I don't remember the name of them.
Q. Would that be the case up in Broward County?
A. Yes, yes.
Q. Based upon that, have you formed an opinion about Mr. Murphy?
A. I think that would sway my judgment.
Q. It would sway your judgment?
A. I think so, yes.
Q. Do you have some pretty hard feelings about that case and the verdict?

(TR. 719)

A. I think a convicted murderer is dangerous.
Q. Would you convict Mr. Murphy based on the fact that he is dangerous?
A. I would like to think that I would not do that, but I can't be sure.
Q. Let me ask you this:
Do you think that notwithstanding the instructions that the Court gives you or that Mr. Jacobs may try to give you, that you would take into consideration his past convictions for a murder in deliberating upon this case?
A. I think I couldn't blank it out of my mind.
Q. And it would influence you in this case?

A. I think it would, yes, I do.
Q. Having all this knowledge, would you prefer not to sit on this jury?
A. Yes.
MR. SWICKLE: I move to excuse her for cause, Judge.

(TR. 720)

THE COURT: Any further questions?
MR. JACOBS: No, Your Honor.
THE COURT: Granted.

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EXCERPTS FROM THE TESTIMONY OF ALICE P. EDWARDS

(TR. 733)

Q. Have you ever heard of Mr. Murphy?
A. Well, some time ago, I read in the paper, but I don't remember anything particularly about it.
Q. Do you get the paper at home?
A. No.
Q. Do you have a television set in your home, ma'am?

(TR. 734)

A. Yes.
Q. Do you watch the news, listen to the news?
A. Not often. Sometimes I do.
I work very hard, and I will be tired.
Q. What hours do you work?
A. From three until eleven.
Q. Do you own an automobile?
A. Yes.
Q. Do you have a radio in your automobile?
A. Yes.
Q. Do you listen to the news broadcasts while you are driving to and from work?
A. Not particularly.
Q. Have you read anything about Mr. Murphy—tell us what you have read?
A. I first read about it when it first happened, you know.

Q. What first happened?

(TR. 736)

Q. Do you remember the outcome of that case; do you remember reading about that?

A. I think he served time.

Q. He served or is serving?

A. Well, I think he served time, is all I know. I think he went to prison for it; I think he did.

Q. Do you know what sentence there was in that case?

A. No, I don't remember that.

Q. But you do remember him serving time for it?

A. Yes.

Q. So you know he was convicted?

A. Yes.

Q. Do you remember anything else about Mr. Murphy going back a little bit further, with regard to his criminal activities?

A. No, I don't.

Q. Would you say that Mr. Murphy is a well publicized individual, well-publicized in the news about his criminal activities.

(TR. 737)

A. I haven't been keeping up with it.

Q. Did you ever read or hear anything concerning Mr. Murphy's sanity or insanity?

A. No.

Q. Did you ever read anything concerning any rulings made by Judge Stedman about Mr. Murphy's sanity, going back a little bit?

A. No.

Q. Now, you have been in this jury room for about what, a week, now?

A. Yes, sir; a week yesterday.

I have been outside, you know, just been roll called.

Q. Roll called, and you have been sitting back there with your other jurors; is that correct?

A. Yes.

Q. Nobody cautioned you not to discuss this case with anybody; you haven't been cautioned by the Judge or

anybody not to discuss this case, have you, up until yesterday?

A. No, we had some kind of little book that we got, you know.

(TR. 738)

Q. Right.

Now, have you heard your fellow jurors back there discussing Mr. Murphy and his related criminal activities while you have been back there; have you heard any of the other jurors talking about it in the last week?

A. Yes.

Q. What have you heard; what discussions have you heard carried on?

A. Well, they were talking about the other case, you know.

Q. The other case, the murder case—did you hear anyone formulate any opinions about Mr. Murphy's guilt or innocence in this case?

A. Yes, I believe so; I imagine I did, you know—people will form their opinions.

Q. Now, would you say that the majority of the people in the back room there believe that Mr. Murphy is guilty of this crime; would you say that is what you have heard from the majority of opinions back there?

(TR. 739)

A. Well, the majority of the people won't discuss it. Some people are discussing it.

Q. Just the people who discussed it.

A. Some were somewhat skeptical about it.

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EXCERPTS FROM THE TESTIMONY OF
BOBBY W. CAPLEY

(TR. 778)

Q. You have heard of Murph the Surf before; haven't you?

A. I've seen it in the paper.

Q. Right.

Now, rather than waste your time, sir, do you honestly say, as you sit there, that you can give him a fair trial, knowing he is Murph the Surf?

A. Well, I don't believe—everybody has read it in the newspaper.

Q. All right.

* * * *

(TR. 780)

Q. And, when did you first hear the name Murph the Surf?

A. I can't recall the first day.

Q. Approximately—a year, two years, three years?

A. I would say 1966 probably. I don't know how long.

* * * *

(TR. 781)

Q. Well, do you connect his name with crime?

A. Well, yes.

Q. Right.

What is the nature of that connection, sir, if you will?

(TR. 782)

A. I wouldn't really—I don't really have a formed opinion on him.

Q. Sir, you have not got a formed opinion at this point?

A. I sure don't.

Q. The question is, when you think of Murphy, do you think of crime?

A. Yes.

Q. All right, fine.

Now, what type of crime do you connect him with?

A. Well, probably robbery.

Q. What robbery?

A. The diamond, or whatever it was that was stolen —whatever you call it.

* * * *

(TR. 783)

Q. Fine, tell us what you connect?

A. Whisky Creek.

Q. Do you know what happened as a result of that, whether he was turned loose, or whether he was guilty, or what?

A. From what I read of it, he was found guilty.

* * * *

(TR. 784)

BY MR. NAGELEY:

Q. Do you connect Murphy as being a convicted murderer?

A. From what I read about him.

Q. That's all we want.

Now, you were called to jury duty when?

A. Last Monday.

Q. You sat in that jury room back there with other jurors?

A. Yes.

Q. In fact, those people discussed the case, the present case; did they not?

A. I was in other courts, mostly watching some others.

Q. All right; but, sir, did you not hear jurors discuss the case?

(TR. 785)

A. It was discussed.

Q. Right.

And as a matter of fact, some of those jurors had him hung already; didn't they.

A. I would say one or two, maybe.

Q. I see.

* * * *

Q. And, in fact, some of the jurors there have Murphy guilty already, even before this trial started; isn't that correct?

A. Probably, yes.

* * * *

EXCERPTS GROM THE TESTIMONY OF PATRICIA SCANLON

(TR. 823)

BY MR. NAGELEY:

Q. Ma'am, do you have a television set in your home?

(TR. 824)

A. Yes.
Q. You listen to the news?
A. Yes.
Q. Do you encourage your kids to be up on the news?
A. Yes.
Q. Do your kids know about Murph the Surf?
A. Well, they know the name.
Q. You have heard the name before?
A. Yes.
Q. What does that mean to you, ma'am? What does it mean to you?

Does it mean that the man is a doctor; does it mean he is a Judge, a dancer, a criminal; what does it mean?

A. He is a criminal.
Q. Right.

Now what crimes do you connect him with?

(TR. 825)

This is not a memory test in any way, Ms. Scanlong. Please tell us what it is about Murphy, his background, what you heard through radio, newspaper, TV, social conversation, anything, any source.

What do you know about Murphy?

Not whatever is right, but what you think that you know?

A. Never read an article in the paper concerning him.
Q. Does the name "Whisky Creek Murders" mean anything to you?
A. I heard that on the radio. That is as far—
Q. Do you connect Murphy with that?
A. That is the only thing I have ever—
Q. And you know whether he is in jail at this time, or whether he is out on bond?
A. He is in jail.

Q. Do you know how long a sentence he is serving?
A. No.

(TR. 826)

Q. Does the name "Museum of Natural History", "Star of India," Delonge Ruby" mean anything to you?
A. I was raised by the Museum of Natural History.
Q. You heard about the theft?
A. No, I wasn't there.
Q. I didn't ask you if you were there.

Do you connect Murphy with the Star of India, the Delonge Ruby or the Museum of Natural History.

A. I heard of this robbery.
Q. Do you connect him with that; don't you?
A. I don't know.
Q. You do, don't you? You know he is connected with it; don't you?
A. I think so.
Q. All right, fine.

• • • •

(TR. 830)

BY MR. NAGELEY:

Q. Ma'am, when you went into that jury room to deliberate, you know that Murphy is a convicted murderer, right?

(TR. 831)

A. Yes.
Q. And you will know that he is a jewel thief; right?
A. Yes.
Q. And is it your statement that you will give the same fair and impartial treatment to Murphy, as such, as you could to somebody you never heard about?
A. I don't know why not.
Q. The convictions wouldn't influence your verdict?
A. (No response)

THE COURT: Shaking her head negatively.

BY MR. NAGELEY:

Q. What is your answer, ma'am?
A. I don't think so. I don't know.

• • • •

EXCERPTS FROM THE TESTIMONY OF RICHARD J. FORNI

(TR. 844)

Q. Will you give this defendant, Jack Murphy, the benefit of that presumption of innocence?

A. Truthfully, sir, under the circumstances, I don't see how I could.

Q. Have you read about him in the news media?

A. I have.

Q. Do you have an opinion in this case?

A. I have, sir.

Q. Let me ask you this question:

Whatever your opinion is, is it so strong that no matter what the evidence produced from that witness stand, no matter what you hear His Honorable Judge Stedman instruct you as to the law, that you would be totally unable to give this man a fair trial?

Are your opinions so strong that they would not yield?

A. It is very strong—put it that way—because he is a habitual law breaker.

(TR. 845)

Q. I understand your thinking. What I want to know is this: Would you let that opinion yield to the testimony and the evidence and the law that Judge Stedman will charge you—base your verdict in this case on the testimony and the evidence and the law that you hear? Would you do that?

A. Well, it's hard to say.

I mean, I have read so much about it.

Q. I appreciate that.

Do you think that you would let your verdict be determined by the evidence from this witness stand; would you do this?

A. No, sir; I don't think I would, sir.

Q. Your opinion is so strong?

A. That's right.

MR. JACOBS: Thank you for your frankness.

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EXCERPTS FROM THE TESTIMONY OF DAVID EDVABSKY

(TR. 855)

Q. Now, sir, do you regard yourself as an individual who likes to keep informed on current events?

A. No.

Q. Can't care less, huh?

Do you talk to your wife about current events?

A. No, sir.

Q. Do you ever talk to your wife?

A. As little as possible.

(Laughter)

Q. Did you ever hear of Murph the Surf before?

A. Only recently, since I have been called here.

Q. That is the first you heard of Murph the Surf?

A. I might have heard it once before, but I didn't take much interest.

• • • •

(TR. 857)

Q. You were called for jury service last Monday a week ago; right?

A. Yes.

Q. When you were back there, you heard the other jurors talking about this case; didn't you?

A. We have.

Q. Before you came in today, you knew this was the Murph the Surf case you were coming into; right?

A. I didn't.

Q. You didn't know before you came into this courtroom today that this was the Murph the Surf case?

A. Before coming into this courtroom?

Q. Right.

A. Yes, I knew that; but you said "going into the courtroom before—"

Q. I am talking about this room.

(TR. 858)

A. Oh, yes.

Q. And sir, in that jury room back there, the prospective jurors, before they came in, were talking about this case; were they not?

A. We discussed it a little.

Q. Right.

Some of them have already found him guilty; didn't they?

A. No.

Q. All innocent; right?

A. Neither.

Q. I see.

What were they talking about? What was the general tenor of the conversation?

A. Do I have to answer this?

Q. Yes, sir; you sure do.

* * * *

(TR. 859)

MR. EDVABSKY: No more than just what he did.

BY MR. NAGELEY:

Q. I see.

You knew, then, that he was a convicted murderer; didn't you?

A. Yes, they mentioned that.

Q. You know that he is serving a life sentence?

A. I heard that.

Q. You heard about the Star of India theft from the museum of Natural History in New York?

A. I heard about that.

Q. Right.

So, he is a convicted murderer and jewel thief; isn't he?

A. That is what they mentioned.

Q. That doesn't make any difference; you can go into that room and pass it off; right?

(TR. 860)

A. Right.

* * * *

(TR. 862)

Q. Now, when you go into that jury room and you decide upon Murphy's guilt or innocence, you are going to take into account that fact that he is a convicted murderer; aren't you?

A. Not if we are listening to the case, I wouldn't.

(TR. 863)

Q. But you know about it?

A. How can you not know about it?

Q. Fine, thank you.

When you go into the jury room, the fact that he is a convicted murderer, that is going to influence your verdict; is it not?

A. We are not trying him for murder.

Q. The fact that he is a convicted murderer and jewel thief, that would influence your verdict?

A. I didn't know he was a convicted jewel thief.

Q. Oh, I see.

I am sorry I put words in your mouth.

Now, sir, after two or three weeks of being locked up in a downtown hotel, as the Court determines, and after hearing the State's case, and after hearing no case on behalf of Murphy, and hearing no testimony from Murphy saying, "I am inocent, Mr. Edvabsky,"—when you go into the jury room, sir, all these facts are going to influence your verdict?

(TR. 864)

A. I imagine it would be.

Q. And in fact, you are saying if Murphy didn't testify, and if he doesn't offer evidence, "My experience of him is such that right now I would find him guilty"

A. I believe so.

* * * *

EXCERPTS FROM THE TESTIMONY OF ALICE M. TAYLOR

(TR. 878)

BY MR. NAGELEY:

Q. Have you ever heard of Murph the Surf before?

A. Yes.

Q. In what connection?
A. Well, the news media.
Q. Right.
Do you associate his name with the Whisky Creek murder case?

(TR. 879)

A. Yes.
Q. What have you heard in that regard?
A. Repeat, please.
Q. What do you know about his connection, whether or not it is right or wrong; what do you know?
A. Very little.
Q. You know he has been convicted, right, of murder, before you came in today?
A. Yes, since I was called on jury, I found that he was.
Q. And, can you connect him with any other crimes?
A. Yes.
Q. I see.
Would you explain that, please.
A. The Star of India is one thing that I recall.
Q. And, do you connect him with the half-a-million dollar securities theft that was the motive for the Whisky Creek murder?

(TR. 880)

A. I am not certain of the Whisky Creek murder, if I must be truthful. It is vague, because I had not read it.

• • • •

(TR. 881)

Q. Now, no matter what the law, Mrs. Taylor, the fact that Mr. Murphy is a thief, a felon, and a convicted murderer, you could still give him a fair trial?

(TR. 882)

A. I supose I will go back to my original statement, that an individual is innocent until proven guilty.
Q. I see.

Now, would the fact that you knew that he was a convicted murderer and a thief involved in a crime influence your verdict?
A. I will repeat:
As far as this case is concerned, it means that he is innocent until proven guilty.

• • • •

(TR. 885)

Q. Now, the correct statement would be to say then, that when you go into that jury room to deliberate, the fact that you know he is a convicted killer, will influence your verdict?
A. It could very well, very possibly be.

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(TR. 888)

Q. Now, insofar as Murphy is concerned, he did not take the stand and offer evidence or alibi, a story of where he was; and on top of this, you know he is a convicted killer, involved in crime, your verdict is going to be influenced by all these facts; right?
A. Quite possibly so.
Q. In fact, when you go in to deliberate, you can't put it out of your mind, the fact that he is a convicted murderer?
A. Correct.

• • • •

(TR. 889)

Q. And no matter how strongly Judge Stedman were to admonish you to follow the law that a man is presumed innocent, the fact of that conviction of murder will forever be in your mind; is it not true?
A. Yes.
Q. And it is going to influence your verdict; is that correct?
A. Very possible so.
MR. NAGELEY: No further questions.
Challenge for cause.

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EXCERPTS FROM THE TESTIMONY OF EVELYN KAMINSKY

(TR. 896)

Q. Do you feel you could give this defendant a fair trial?

A. No, because, I read a lot of papers. I have read everyday and listened to the radio and television.

* * * *

EXCERPTS FROM THE TESTIMONY OF WILLIAM IZZARD

(TR. 915)

Q. You have heard the name of Murph the Surf before; have you not?

A. Yes, I have.

Q. In what relationships?

A. In connection with the Whisky Creek murder case, I would assure.

Q. Tell us what you know about that, sir.

(TR. 916)

We are not testing your memory for accuracy.

A. That he was on trial for this case, and I believe that there was an insanity plea or something along that line; and that he is, I think, in the State Mental Hospital, I believe.

Q. I see.

On that case, do you know whether or not he was convicted in Broward County of the Whisky Creek murder?

A. I will be honest with you, I don't recall—either Dade or Broward, one of the two.

Q. Do you subscribe to a newspaper?

A. Yes.

Q. Which newspaper?

A. The News and the Herald on Sunday.

Q. Do you remember a series of copyrighted articles in the Miami News about Murph the Surf?

A. I remember them vaguely.

Q. Do you remember whether you read them or not?

(TR. 917)

A. I probably read one or two of them. I don't believe I read the whole series.

Q. At this time, do you know whether or not Murphy has ever been convicted of a crime?

A. This time?

Q. From anything you read or otherwise.

A. I believe he has, yes.

Q. Do you recognize the term Star of India, De Longe Ruby?

A. Yes.

Q. Do you associate that with Murph the Surf?

A. Uh-huh.

Q. Do you know whether or not he was—that was a crime or just a caper; or what?

A. I will be honest with you: I don't remember.

Q. Now, have you ever discussed, since you first heard the name Murph the Surf, any of his exploits, any of his actions?

A. You mean, with friends?

Q. Right.

A. I would assume I had; yes, sure.

(TR. 918)

I don't think anybody hasn't.

Q. That is, anybody that you ever came into contact with?

A. Well, I wouldn't say everybody; but I would say that probably I have discussed with some, with a number of people.

Q. Have you ever heard expressed an opinion about Murph the Surf, whether he is sane or insane?

A. I don't recall. I will be honest with you: I don't remember if I have or not.

Q. Did you ever express an opinion about Murphy's behavior? Do you believe he is a menace to society or believe he is a real great guy?

A. Well, I don't think—ever saying he was a real great guy.

I will tell you—

Q. Have you ever said he was a menace?

A. I might have said that, yes.

Q. Do you remember, in July of 1968, that Murphy was—there was a hearing on Murphy's sanity or lack of sanity?

(TR. 919)

A. I remember something about that hearing, yes.
Q. Are you aware of the furor, the public outcry that followed that hearing?
A. I believe I am, yes, a little bit—something in regard to jurisdiction or whether it was to be held in Broward County or here, or there was a conflict—some conflict in connection with that.
Q. Fine.
Let me try to refresh your memory, if I may:

Do you remember the Shevin Committee, a committee appointed by Governor Kirk investigating Judge Stedman's actions in adjudicating Murphy insane?
A. I remember the Shevin Committe and the defendant —something to do with it, or it was investigating something along that line, yes.
I don't remember anything about Governor Kirk.
Q. Now, sir, in the event that you go into that jury room, if the Judge were to tell you to forget the fact that you work for WIOD, you couldn't put that out of your mind; could you?

(TR. 920)

A. I don't know in what regard you mean that.
Q. If the Judge says, Mr. Izzard, when you get into the jury room, I want you to forget that you work for WIOD." Could you forget that fact?
A. I assume so. I could probably forget the fact that I work for anybody, I would assume.
Q. When you went to the jury room to deliberate on Murph the Surf's guilt or innocence in this case, can you forget the fact that he was a convicted criminal?
A. That might be a little harder to do.
Q. I see.
Could you forget the fact he is not only a convicted criminal, but you have expressed the view that he is a menace?

A. Well, I think you are putting words in my mouth. I didn't say he was a menace. You said I said he was a menace.

(TR. 921)

Q. You said you did. You did not talk about him in relation to his being a great guy?
A. Right.
Q. Explain what you have explained. Don't let me put words in your mouth.
A. I would assume that the preponderance of testimony or evidence, or what is brought out in the case, made me feel that I would not necessarily want to be a friend of his—put it that way..
Q. All right.
Now, that is on the basis of what you know already, without knowing anything about this case; is that correct?
A. Right. I don't know a thing about this case.
Q. I see.
And your knowledge of him, sir, would influence your verdict in this case; would it not?
A. I would try not to have it influence me—put it that way.

(TR. 922)

I would not deliberately, the same way I wouldn't let WIOD be an influence.

• • • •

Q. Sir, do you hold a convicted felon in the same regard as another person who has never been convicted of a felony?
A. Honestly, probably not.
Q. Right.

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(TR. 925)

Q. Would you consider the fact that he is a convicted killer when you are deliberating?
A. It would have a bearing, probably.
Q. Right.
Would it influence your verdict?

A. Again, I would say I would try not to.

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(TR. 926)

Q. Do you honestly believe, when you are considering you verdict, that you wouldn't be influenced by the fact in that verdict that he is a convicted killer?

A. I would not let it influence me.

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EXCERPTS FROM THE TESTIMONY OF LOUISE SCOGGINS

(TR. 950)

Do you remember reading or hearing about this?

A. I did, yes.

Q. Now, this defendant, Mrs. Scoggins, as every defendant in our land, is presumed innocent. The law says that we presume it—it is not a statement of fact, but it is up to the jury to determine; but it is a presumption of law that every man that is charged with a crime is presumed innocent. The State has to prove his guilt. Will you give this defendant, Jack Murphy, the benefit of this presumption of innocence?

A. Yes.

Q. The State must prove his guilt beyond and to the exclusion of every reasonable doubt. Will you follow this if Judge Stedman says this is the law?

(TR. 951)

A. Yes.

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(TR. 956)

Q. Now, is it your habit to listen to the news?

A. On television, yes.

Q. And, do you listen to Channel Four, Seven or Ten?

A. Seven.

Q. And that is the major source of your news?

A. Yes.

Q. Do you subscribe to any newspaper?

(TR. 957)

A. Yes.

Q. Miami Herald?

A. Herald.

Q. Do you get the Herald at home?

A. Yes.

Q. And, this week, ma'am—please indulge me if you will—did you see this article entitled, "Manicured Murph Stars in Court."

Did you see that?

A. Yes, I did.

Q. Did you read it?

A. No.

Q. Did you read part of it?

A. No.

Q. Now, another article entitled, "Murphy Jurors Rejected," in the Miami Herald—did you see that?

A. No.

Q. And this one on Friday in the Herald, "Defense Exhausts Jury Challenges in Murphy Trial"?

A. Yes.

Q. Did you read that?

(TR. 958)

A. Yes.

Q. And did you see that part of it where it says:

> "Jury selection will continue today in the trial of beach boy hoodlum serving a life sentence for murder in connection with the Whisky Creek slaying of two secretaries in 1968"?

As you sit there, ma'am, he is a convicted murderer; right?

A. Yes.

• • • •

(TR. 959)

Q. Now, you say that you had read about this case and you heard about this case on TV and in the news.

We are specifically concerned with the Wofford case. You have heard about that; is that correct?

(TR. 960)

A. Yes.

Q. Now, we are not trying to test your memory, Mrs. Scoggins, in no way at all.

Tell us what you remember about the facts of the case?

A. Well, I remember that he broke into the house, or someone broke into the house, and I don't know what they stole; I don't remember.

• • • •

(TR. 962)

Q. When were you called to jury service?

A. A week ago today.

Q. And you have been sitting in that little room down there; haven't you?

A. Yes.

Q. And you have heard members of the panel discuss this case?

A. Yes.

Q. And you have heard members of the panel, in fact, say that Murphy is guilty; have you not?

A. Yes.

Q. And some of them had already spoke, said, "Turn the lock and throw away the key"; right?

A. Well, I don't know whether they have or not.

(TR. 963)

Q. Now, the fact that people in the community had voiced an opinion about his guilt, that wouldn't influence your verdict?

A. Why should it, no.

Q. Please tell us, ma'am, some of the comments made by the people in the jury room that you heard.

A. Well, every morning they say there is four picked, or whatever, they ask, "Who read the paper or saw it on the news?"

Then, naturally, a lot of them say they hope it's the last day, they want to get it over with, you know, they want to leave.

• • • •

Q. Have you, since January 28, 1968, or any time thereafter, have you ever heard anybody express an opinion about Murph the Surf?

(TR. 964)

A. Just recently that this has come up.

Q. Never before that?

A. Well, probably when it was in the paper or something, but—

Q. Isn't it a fact you hear it said that this man should be put away—not you, but you have heard this all over the community?

A. Yes.

Q. Now, the fact that the hue and cry of the community wants Murph the Surf put away, that wouldn't influence your verdict?

A. Well, I am supposed to decide, not what everybody else decides. This is the way I understand it.

I don't know.

• • • •

(TR. 966)

Q. Did you ever hear of the DeLonge Ruby?

A. Yes.

Q. Do you associate Murphy with that?

A. I associate him with the Star sapphire or something—I don't know.

Q. When you think of Murphy, do you think of a tap dancer, do you think of a priest, do you think of a criminal, or what?

A. As a criminal, I guess.

(TR. 967)

Q. Now, if you go into that jury room and deliberate with your fellow jurors, in your deliberations, will you consider the fact that Murphy is a convicted murderer and jewel thief?

A. Well, he has been convicted of murder. So, I guess that is what I would—

Q. You would consider that in your verdict, right?

A. Right.

Q. And that would influence your verdict; would it not?

A. If that is what you say, I guess it would.

Q. I am not concerned about what I say, because if I said it, they wouldn't print it.

It would influence your verdict?
A. It probably would.

* * * *

(TR. 969)

Q. When you go into that jury room, you cannot forget the fact that it is Murph the Surf; that he is a convicted murderer, and a jewel thief—you can't put that out of your mind, no matter what they tell you; can you, ma'am?
A. Probably not.
Q. And it would influence your verdict; right?
A. Probably.

* * * *

(TR. 972)

THE COURT: Lady, do you have, at this time, any fixed opinion in your mind, for or against the State, or for or against the defendant, that are so fixed or so permanent that those opinions, whatever they may be, could not yield to the testimony in the case, and whatever that testimony or whatever that evidence may be, if any?
MRS. SCOGGINS: No.

* * * *

EXCERPTS FROM THE TESTIMONY OF ROBERT W. CARMICHAEL

(TR. 991)

Q. And now, you stated you already read about this case?
A. This is true.
Q. And when the State presents its case, they are going to reinforce your memory of it; right?

* * * *

Even though you are taught to follow the law, if you went into that jury room, and you were instructed to follow the law to put it out of your mind, it would be impossible to do so; would it not, sir?

(TR. 992)

A. I wouldn't say it would be impossible. It would be difficult, more than that.
Q. And the fact that you knew about this case would tend to influence your verdict; would it not?
A. I would hate to admit that, sir.
Q. I know that. We are not asking you for admissions against interest, or any such thing as that.
But if you heard the State's case during the next two weeks, and you have already heard about the facts of this case from whatever source, and you only heard one side, you would hold that against the defendant, right?
A. I imagine that would be true.

* * * *

(TR. 993)

Now, you have heard of Murph the Surf?
A. Yes, I have.
Q. Do you know that Murph the Surf is the same as Jack Roland Murphy, sitting right there?
A. So I was informed; yes, sir.

(TR. 994)

Q. You were called to jury duty Monday a week ago?
A. Wednesday, the 29th.
Q. Wednesday, the 29th?
A. Yes.
Q. Since that time, sir, you have been sitting in the jury room back there with other jurors; right?
A. Right.
Q. And you have heard, isn't it a fact, sir, you have heard other jurors discuss this case?
A. Oh, I heard lots of comments.
Q. Do you remember any comments to the effect that he is guilty?
A. I think I do.
Q. Have you ever expressed any opinion about Murphy, no matter what the opinion?
A. Yes, I expressed an opinion on his character.
Q. What was that, sir?
A. That he is not the type of character that I admire.

(TR 995)

Q. And now, when you think of Murphy, you don't think of him as a priest or a rabbi or a minister, do you? You think of a criminal; right?

A. Yes, sir. He is a convicted criminal.

Q. I see.

Do you read the Miami Herald, sir?

A. Not regularly, sir.

I go to work at five-thirty in the morning, and I very seldom have time to read the paper until maybe in the evening, if it is still there.

Q. Have you read any news articles about Murphy?

A. Yes, I have.

Q. You know that he was convicted of murder; right?

A. Yes, I do.

Q. And you know where that took place, that trial?

A. I think it was in Broward.

Q. And, do you know what the popular name is?

(TR. 996)

A. The popular name?

Q. Of the crime?

The Whisky Creek murders?

A. Oh, yes, that is true.

Q. Do you remember that name?

A. I do, I do.

Q. Do you associate a jewelry theft with Mr. Murphy?

A. Yes, I do.

Q. And, would you tell us what you know about that, sir?

A. Well, it's the Star of India jewel robbery in New York, and I read about it.

I think it was even in one of the popular magazines, I read an article about it, how it was committed and planned.

Q. And because of that experience, you heard that Murphy is a jewel thief as well?

A. Yes.

Q. Now, have you read anything or heard anything—at work, or at home—has anybody expressed an opinion about Murphy to you, ever?

(TR. 997)

A. At work or at home?

Q. Either one, or socially—whatever?

A. Socially, yes.

Q. What were some of the comments, sir?

A. Well, I heard comments that they couldn't see him being a murderer or a jewel thief; seemed like it was out of character—things like that.

Q. Do you remember, in 1968, the furor in this community because Judge Stedman made a ruling about Murphy's mental condition?

A. That, I honestly don't remember.

Q. I see.

Now, sir, you can't forget that you are a married man; can you?

A. No.

Q. You can't forget that you have got four kids, and that two of them are twins; right?

A. Right.

Q. And you can't forget that you are a mechanic at Pan American Airways?

A. No.

Q. If Judge Stedman were to tell you, "I want you to go into that jury room and forget those things," you couldn't do it; could you?

(TR. 998)

A. You are more than likely right.

Q. No way possible.

Now, if Judge Stedman were to ask you to go into that jury room and forget that Murphy is a convicted murderer, you couldn't do that; could you, sir?

A. No, I couldn't forget that.

Q. You couln't forget that he was a jewel thief?

A. No, sir.

Q. And, in fact, sir, it is such a part of your memory that when you deliberate upon the facts of this case, they have got to influence your verdict; right?

A. Well, I don't know, because if I am instructed to disregard it, I can't take that into consideration, although it is part of my knowledge.

You know, I follow procedures a lot to disregard this, and don't do that, and do this in this case. I pay attention to establish procedures. I do this every day.

(TR. 999)

Q. I understand that, sir.

But if you accept the proposition that you are the sum total of all your knowledge and all your experience that you have ever had—

A. That is true.

Q. —when you go back into that jury room, you can't put out of your mind the fact that a man who is pleading with you to find him not guilty, you can't give him the same impartial treatment that you could to another person; right?

You know he is a convicted killer?

A. Yes, I know that; but I would try to judge the man on the merits of the case and the evidence presented to me only, not anything else, although I know it to be a fact in my mind.

I wouldn't let that into consideration.

Q. In a close case, whether it was guilt or innocence, you would tend to go for guilt if you knew he was a convicted killer; wouldn't you?

A. To me, that wouldn't be fair.

(TR. 1000)

Q. I understand, sir.

But that would be your verdict?

A. I hope not.

Q. Now, sir, just please indulge me.

Let's suppose that the person sitting there were not Murph the Surf. It is a young, personable-looking man charged with the same crimes here.

You know nothing about him. He didn't take the stand and testify, and you didn't know he was a convicted killer.

When you went into that jury room, you would be more likely to give him a break than you would a convicted killer; wouldn't you?

A. Well, I wouldn't have any personal knowledge of him whatsoever, and that would be less of a problem, admittedly.

Q. So, the fact that you know he is a convicted killer does pose a problem?

A. I could, sir, but it shouldn't.

Q. But it is there; right?

A. That's right.

• • • •

EXCERPTS FROM THE TESTIMONY OF IRENE TRZCINKA

(TR. 1016)

The defendant in every criminal case, Mrs. Trzcinka, is presumed to be innocent. The law says that this is a presumption of law, not a factual matter absolute.

(TR. 1017)

Will you give this defendant, Jack Murphy, the benefit of this presumption?

A. I don't know, sir, at this point.

Q. Do you feel you have an opinion at this point?

A. No, sir.

Q. Well, if His Honor charges you that you are to give the defendant the presumption of innocence, will you do it?

A. I don't believe I can.

Q. Because of what you have read in the newspaper?

A. Yes, sir.

Q. Well, let me ask you this way:

You don't believe that if Judge Stedman instructs you that the law is that every man is presumed to be innocent, and that the State must prove the guilt of this defendant, Jack Murphy, beyond and to the exclusion of every reasonable doubt, you could follow that?

(TR. 1018)

A. I guess I could follow it.

Q. And following this, will you give the defendant a fair trial?

A. I don't know.

Q. Because of what you have read in the paper?

A. Yes, I still would stick to that.

• • • •

(TR. 1019)

Q. When you say you have no opinion, you have not formed an opinion, do you have an opinion as to the guilt or innocence of the defendant?

A. Oh, yes, I have. That is what I mean.
I have in my mind an opinion.
Q. But you would allow that opinion—you would base your verdict in this case upon the law that Judge Stedman gives you—won't you—on the testimony and the evidence in this case from the witness stand; you could do that?

* * * *

(TR. 1020)

BY MR. JACOBS:

Q. Mrs. Trzcinka, you will base your verdict on the testimony and the evidence and the law that His Honor gives you?

(TR. 1021)

A. Yes, sir.

* * * *

(TR. 1024)

Q. And notwithstanding the fact, ma'am, that you are an upright citizen in this community and do follow the law, do you feel that your opinion about Murph the Surf is such that you could not give him a fair and impartial trial; is that correct?

(TR. 1025)

A. Yes, sir.

BY MR. JACOBS:

Q. Didn't you just tell me, Mrs. Trzcinka, that you would give this defendant a fair trial, and base your verdict on the testimony and evidence from that witness stand?
A. I didn't know. I thought you were just speaking generally.
Q. With this man, with this defendant, will you base your verdict in this case upon the testimony and evidence that comes from this witness stand?
A. No, sir.

* * * *

EXCERPTS FROM THE TESTIMONY OF TITO CACACE

(TR. 1029)

Q. Mr. Cacace, this case attracted a considerable amount of publicity in the news media.
Do you remember reading anything about this? This was the Wofford robbery on Miami Beach, where the defendant and others broke into Mrs. Wofford's home.

(TR. 1030)

A. No, I don't read the paper that much, just when it concerns me.

* * * *

BY MR. NAGELEY:

Q. When were you called for jury duty, sir?
A. Wednesday.
Q. And that was Wednesday of last week?

(TR. 1031)

A. Right.
Q. And during that period of time, you have had occasion to mill with other prospective jurors, did you not?
A. Right.
Q. And, that was in the jury room, as well as in the halls?
A. Right.
Q. Did you hear any of the prospective jurors discuss the Murph the Surf case.
A. Yes.
Q. Did you hear any of those persons express an opinion about his guilt or innocence?
A. Yes.
Q. I see—more than one, sir?
A. Yes.
Q. How many would you say?
A. It may have been two or three, actually said it.
Q. I see.
Do you have any opinion as to what the convictions of the persons on the panel were about the guilt or innocence of Murphy?

(TR. 1032)

A. They said, you know, that he should be convicted, but I guess when they get on the witness stand, you know, they will be honest about it.

Maybe the ones that professed with their mouths may come in and speak on the witness stand, and they might have a change of mind.

I don't know.

Q. So, notwithstanding the fact that they feel he is guilty in the jury room, they come in here holier than thou; right?

A. I believe they would.

* * * *

EXCERPTS FROM THE TESTIMONY OF DANIEL FERGUSON

(TR. 1045)

Q. Now, did you hear any of the panel, prospective panel, discussing the Murph the Surf case?

A. Sure.

Q. And, would you tell us generally what was the nature of the discussions?

A. Well, it's just—talk.

I would seriously—I would say that I thought that some of the discussions that I overheard, that the people involved with, seriously, from what I heard, made me sick to my stomach.

Q. What were they saying?

A. You know, his guilt or innocence.

I really don't know which people feel that way.

If I believe in the system, I can't believe this.

Q. But tell us what the comments were that caused you to feel sick to your stomach?

A. Like, "Hang him, he's guilty." This kind of thing.

Q. That was the jury panel?

A. Some of them, yes.

Q. "Hang him, he's guilty"—right?

Now, I understand that you have only known these people as short period of time.

Do you remember, do you know the names of any of the persons who said that?

A. No, sir.

Q. Let me see if I can refresh your recollection.

Did a Patricia Esher say it?

A. I wouldn't know.

Q. How about James Collins?

A. I wouldn't know.

Q. How about David Edvabsky?

A. I wouldn't know.

(TR. 1047)

I could tell one individual that I knew out there. I knew him before then, but I know he was connected—connected his name and face, because he worked at Pan American, as I do.

That was the only individual I can connect any name with.

Q. I see, I see.

And his name was—

A. Robert Carmichael.

Q. Robert Carmichael?

A. I never met him before I saw him over here.

Q. And he expressed an opinion about the case; didn't he?

A. Oh, not extreme.

Q. But he did express an opinion; right?

A. I think he said—

Q. What did he say?

A. He said—made one statement such as that "I believe I can give the man a fair trial, even though I may believe that the man may be thoroughly rotten; but I still think that I could give him a fair hearing."

(TR. 1048)

Q. Thoroughly rotten, but he could give him a fair trial. Thank you, sir.

Now, you have heard of Murph the Surf before you came to the Courthouse; haven't you, sir?

A. Oh, yes.

Q. And, when you think of Murph the Surf, do you think of a ballet dancer, a priest, a judge, a prosecutor, a criminal—how do you think of him?

A. Well, more or less as a character that the Miami Herald created, a fantasy.

I can't connect him with a live human being, a person.

Q. Let me introduce you to Murph the Surf, that gentleman sitting over there, Jack R. Murphy.

Now, you know, sir, that he was involved in the Whisky Creek murder incident; don't you?

(TR. 1049)

A. I read such.

Q. You know he was convicted?

A. I read such.

Q. And you read that before you came to the Courthouse; right?

A. Yes, a long time ago.

Q. Do you get the Miami Herald?

A. Yes, sir; I do.

Q. Have you obtained the Herald this week?

A. Yes, every morning.

Q. Please indulge me, if you will, Mr. Ferguson.

I show you an article in the Miami Herald, dated July 28th of 1970, entitled "Manicured Murph Stars in Court."

Did you see that, sir?

A. Yes, I think so.

Q. You read it?

A. I think so.

Q. Then you read in there that he is serving life in Raiford for the killing of the two broads, the two girls?

(TR. 1050)

A. I think so.

Q. And you also read in there that he was connected with the Star of India jewel theft?

A. If you say it is in the article.

Q. It sure is.

A. I read it.

• • • •

(TR. 1052)

BY MR. NAGELEY:

Q. Mr. Ferguson, sir, the Miami Herald article dated July 30, 1970, "Murphy Jurors Rejected"—did you see that article, sir?

A. I believe I did.

I am not sure, but I think somebody mentioned it to me.

Q. And that somebody, of course, would be somebody on the prospective panel; right?

A. Probably.

Q. This article dated July 31, 1970, "Defense Exhausts Jury Challenges in Murphy Trial"—did you see this?

A. Yes, I think I did.

Q. Do you remember reading it, sir?

A. Yes, sir. I think I read that.

Q. And that article states:

> "Jury selection will continue today in the trial of beachboy hoodlum, a criminal serving a life sentence for the Whisky Creek murder of two secretaries in 1968."

(TR. 1053)

So, as you sit there today, you know that Murphy is a convicted murderer; is that correct, sir?

A. Yes.

Q. And a jewel thief?

I show you Exhibits 5 and 6.

Five is entitled "Murphy Jury Still Unseated."

Number 6 is entitled "Two Impaneled in Murphy Case."

Did you see these, sir?

A. I think I did. I'm not sure.

Q. It is safe to say that you have taken an active interest in this trial?

A. Not this trial.

Q. The facts of the case?

A. I have no facts of this case.

Q. I see.

Now, did you ever hear about the Wofford robbery case?

(TR. 1054)

A. I don't remember it.

Q. Well, Mr. Jacobs said earlier about the case, where the defendant allegedly went into the home of Olive Wofford.

A. Olive Wofford—is that the name, what he told me?

Q. Okay.

You read about it before?

A. I do recall something of it.

Q. Just take your time, if you will. I realize it's a strain, that there is a dimming of the memory.

What do you remember reading about the Wofford case?

A. Well, just the name Wofford. I don't really connect it.

I remember some incident of a robbery on the Beach, and somebody run through one sliding glass doors or something. This is all I can connect with it. I don't know whether this is the particular incident that we are referring to here or not. I am not positive.

(TR. 1055)

I do remember that particular thing.

• • • •

(TR. 1058)

Q. Let me ask you this, sir:

Directing your attention to July 2nd of 1968, and the days immediately subsequent thereto, do you remember the overwhelming clamor in this community when Judge Stedman adjudicated, decided that Murphy was incompetent to stand trial?

A. I am not sure of too much detail. I remember something.

Q. I am asking about the incident.

Do you remember Murphy being judged nuts by Judge Stedman?

MR. JACOBS: Objection.

MR. FERGUSON: I don't remember that.

• • • •

(TR. 1062)

Q. Right.

You will consider his failure to testify and his failure to offer a defense in your verdict; will you not?

(TR. 1063)

A. Not the failure to testify, no.

Q. All right.

How about his failure to offer witnesses?

A. That is up to you to prove. That is up to you to defend him; is it not?

Q. Fine.

It is also up to me to offer proof, is it not; and if I fail to offer proof as a defense, you will consider that?

A. No. He has got to do the proving over there (referring to Mr. Jacobs).

Q. All right.

Now, you state that you can give Murphy a fair and impartial trial beyond and to the exclusion of every reasonable doubt; is that correct?

A. Yes.

Q. And you can give a convicted murderer a fair trial; right?

A. I certainly can. I hope I can.

If I can't—if I believe in the system, I have got to.

(TR. 1064)

Q. What system are you talking about?

A. The system of justice in this country.

I mean, I have got to believe that a man is innocent until he is proven guilty.

Q. Do you know anything about Murphy's pleading guilty to the theft of a half-a-million dollars in securities in the Federal District Court of Miami?

A. No, I don't recall that.

Q. Sir, if you know that Murphy was involved in the Whisky Creek murders, weren't you naturally curious to know the motive for the murders?

A. I don't know. I guess I must have read it at the same time—must have satisfied any curiosity I must have had.

Q. Didn't you, in fact, learn that the theft of a half-a-million dollars in securities was the motive for the murder?

A. No, I don't remember that that was connected or not.

• • • •

(TR. 1069)

If this was a close case of guilt or innocence, because of the fact that you know Murphy is a thief and a murderer, you are going to decide in favor of the State; aren't you?

A. Not on the grounds that he has been convicted of something else, no.

Q. Can you give him the same fair and impartial trial that you could to a person whom you never have known before, a person that you don't know whether or not they have ever been convicted of a crime?

A. Certainly can about anyone in this case—I don't know.

Q. The fact that Murphy is a convicted felon means nothing to you; right?

A. Not in this case, no.

• • • •

EXCERPTS FROM THE TESTIMONY OF SALLY ARONOW

(TR. 1100)

Q. Do you feel that you can give this defendant a fair trial?

A. I don't think I could, really, from all the newspapers that I have read, all the articles.

I think I would be biased.

Q. And you feel that—let me ask you this way:

You have an opinion, I take it from your answer?

A. Yes.

Q. Whatever your opinion is, will you let the testimony and the evidence and the law from Judge Stedman decide your verdict in this case?

A. Yes, I will.

Q. Is your opinion so strong that you wouldn't let it yield to the evidence?

A. No, it isn't that strong.

• • • •

(TR. 1106)

Q. Now, you stated you have an opinion about this case?

A. Yes.

Q. What is that opinion, ma'am?

A. Well, from everything that I have read so far, it seems that he is guilty.

Q. I see.

The basis of your opinion is from your reading, is that correct?

A. Yes.

(TR. 1107)

Q. When did you report here at the courthouse in response to your summons for jury duty; what day?

A. It was, I believe, eight days ago.

Q. Last Wednesday?

A. Yes.

Q. And during that period of time, ma'am, you have had an opportunity to sit among the prospective jurors or stand among them?

A. Yes.

Q. And in fact, ma'am, you have heard other jurors express an opinion about Murphy's guilt?

A. Yes, I have.

Q. And would you elaborate on that, please, for us and tell us what you have observed or heard?

A. Well, there wasn't really too much discussion there.

I mean, everybody just said, made the point that they believed that he was guilty, and that was it.

I mean, we had so many other things to discuss.

(TR. 1108)

Q. I see. Thank you, ma'am.

Now, Mr. Jacobs asked you if any member of your family has ever been involved in a crime more serious than a traffic violation, and you answered no. Right?

It is to be concluded from your appearance as well as your mannerism and your history, that you will follow the law, and you intend to do that for the rest of your life; right?

A. Yes, I will.

Q. Now, when you go into the jury room, ma'am, you will try to follow the law that the Judge told you, right?

A. Yes, I would.

Q. But nevertheless, when you went into that jury room, your opinion is so fixed that you could not follow the law; you would have to find Murphy guilty on the basis of what you believe; isn't that correct?

A. Yes.

MR. NAGELY: No further questions.

(TR. 1109)

BY MR. JACOBS:

Q. When you say you would find Murphy guilty, that would be if the State proves his guilt to you?

A. My mind right now is fixed that he is guilty, and it would have to be proven to me otherwise.

Q. Would your—

A. Right now, I am sort of prejudiced. It would take a lot of proof that he was innocent of the crime.

* * * *

(TR. 1112)

Q. Now, do you feel an opinion that is so fixed right now that it would not yield to the testimony and the evidence from the witness stand?

A. Well, I have to be very truthful about that.

(TR. 1113)

Right now, my mind is fixed that he is guilty.

Q. Would that opinion yield to the evidence from the witness stand?

A. It's very, very hard for me to say, because I know from everything in the past that it would be very hard for me to answer.

Q. I don't mean to be difficult, but this is the moment of truth, and I have to ask you that.

A. I know that.

Q. Do you feel that this opinion would yield to the testimony and the evidence from the witness stand?

A. Yes, I think so.

Q. When you say you think so, is that answer yes?

A. Yes.

MR. JACOBS: That's all.

BY MR. NAGELY:

Q. Now, your opinion, Mrs. Aronow, is so fixed at this time that unless Murphy proved he was innocent, that opinion would not change; would it?

(TR. 1114)

A. Right.

MR. NAGELEY: No further questions.

THE COURT: Lady, I will excuse you for cause.

* * * *

EXCERPTS FROM THE TESTIMONY OF BOBBIT CORRELL

(TR. 1125)

Q. Have you read anything about this case since you were called for jury duty?

A. Yes, sir, I have.

Q. And that was in the Herald?

A. Yes.

Q. Would you indulge me while I ask you if you recall the articles—may I have the articles please, Mr. Clerk.

This is the first article that appeared here, A-2 for Identification, an article entitled, "Manicured Murph Stars in Court." Do you remember seeing that, sir?

A. I remember the headline.

Q. Now, the next is an article, A-3 for Identification, "Murphy Jurors Rejected."

A. Yes.

Q. Did you read that, sir?

A. Yes.

Q. And another article entitled, "Defense Exhausts Jury Challenges in Murphy Trial."

Do you remember seeing that?

(TR. 1126)

A. Yes.

Q. Do you know from these articles that Murphy is a convicted criminal?

A. Yes.

Q. And another article dated August 2, 1970, A-5 for Identification, "Murphy Jury Still Unseated."

A. I don't remember that one.

Q. All right.

This article, which is A-6 for Identification, dated August 6th, Miami Herald, "Two Empanelled in Murphy Case."

A. I don't remember that one.

Q. When did you report for jury duty?

A. On Wednesday last.

Q. Last week.

And during that period of time, sir, you have been with and among the prospective panel back there in the jury room?

A. Correct.

Q. And you have milled around the fourth floor with them?

Now, you have not been sworn to secrecy by the Judge up to this point?

(TR. 1127)

A. No.

Q. Have you been permitted the opportunity to talk as you please, under your freedom of speech privilege, as have the other jurors; right?

A. Right.

Q. Now, in fact, sir, in that panel room you have heard prospective jurors discuss this case; have you not, sir?

A. Very much.

Q. Very much was your answer?

A. Yes.

Q. And in fact, sir, you have heard people express their opinion that Murphy is guilty; have you not?

A. Yes.

Q. Now, as part of your practice of discussing current events, encouraging knowledge of current events among your children, is it correct to state that you knew of Murph the Surf before you ever came to this courtroom?

A. I heard the name.

Q. When you think of Murphy, does it denote a person of a high standard of professionalism? Does it denote an artisan; does it denote a criminal, a member of the underworld, or what?

(TR. 1128)

A. I hadn't associated anything with him particularly.

Q. Now, does the name Whisky Creek murder prompt a reaction in you?

A. I remember that from the articles in the paper.

Q. I see.

Now, that has not been since this trial but before?

A. Right.

Q. Now, did you connect Mr. Murphy with those murders?

A. In the newspaper article, yes.

Q. We are not trying to check the accuracy of your memory, or the authenticity of your knowledge, but only what you have seen and have heard.

Now, you know from reading the newspapers and from prior experience, that Mr. Murphy was convicted of the Whisky Creek murders; is that correct?

(TR. 1129)

A. Yes.

Q. And that he is in fact serving a life sentence; you knew that before last week; is that correct?

A. Yes.

Q. Do you know of Murph the Surf in any other relationship, sir?

Do you connect him with any other crimes or any other episodes or escapades or incidents?

A. The Star of India was connected with him, I think.

Q. Do you know, in that relationship, do you regard him as a criminal?

A. No, I don't remember how that came out.

Q. But you do remember it was a jewel theft?

A. Yes.

Q. Now, has your wife ever expressed an opinion to you about Murph the Surf?

(TR. 1130)

A. Not that I can remember.

* * * *

(TR. 1131)

Q. If the Judge will instruct you that every defendant is presumed to be innocent—now, I want you to search

your soul, if you will, and answer this question—in regard to Mr. Murhpy, in the trial of this case, isn't it a fact, sir, that your presumption of innocence will be diluted by the fact that you know he is a convicted killer?

A. I don't think so.

Q. Your statement is that you could put that out of your mind in considering your verdict; is that right?

(TR. 1132)

A. For this particular case.

* * * *

EXCERPTS FROM THE TESTIMONY OF ELINOR TYREE

(TR. 1168)

Q. I see.

Now, you in fact heard other persons express opinions, their opinions about this case; did you not?

A. Well, I suppose everyone has some sort of an opinion; but an opinion before the case is ever known—we don't know what the case is about, because people don't know what the case is about.

Q. Is it not correct, ma'am, that some of the prospective jury panel already have judged Murphy guilty, even before they came in here?

(TR. 1169)

A. Some of the people were very disgruntled about having to wait so long, and they were saying things they didn't really mean.

Q. We are not concerned whether they meant them or didn't mean them.

Would you please respond to the question?

There were in fact persons who said he was guilty; right?

A. I have heard that.

Q. And you heard it from more than one person?

A. Yes, but in a tone of voice that was just sort of an I-wish-I-weren't-here sort of thing.

Q. Did you hear one juror make the reference that Murphy was rotten?

A. No, I didn't hear that.

Q. Now, you have heard of Murph the Surf, ma'am, before you came to this courtroom last Wednesday; did you not?

A. Yes, I have.

(TR. 1170)

Q. And you know he is a convicted killer; don't you?

A. Yes.

Q. And, I didn't put that in your mind; you knew that already?

A. Yes.

Q. How did you learn that?

A. I think I read it in the newspaper.

Q. What paper would that be, the Herald?

A. The Herald. That was some time ago.

Q. Do you regularly subscribe to that?

A. Yes, we do.

Q. Have you read any article in the past week about the Murphy case, the past two weeks?

A. There has been very little in the newspaper about the case.

Q. How about TV and radio?

A. I heard nothing about it. I haven't heard it on TV.

Q. Now, but you do know Murphy is a convicted killer?

(TR. 1171)

A. Yes.

* * * *

EXCERPTS FROM THE TESTIMONY OF JOHN FULLER

(TR. 1213-1214)

Mr. Fuller, have you read anything about this case in the newspaper? This is the Wofford robbery?

A. I tell you, every time you turn around—you can't help it. You turn around, the radio, the TV—it's the same thing over and over.

* * * *

EXCERPTS FROM THE TESTIMONY OF ALAN CLARK

(TR. 1231)

Q. Have you heard about this case in the newspapers?
A. Yes.
Q. Do you have an opinion right now with regard to the guilt or innocence of the defendant?
A. According to what he is up for now, yes.
Q. That would be the Wofford robbery, the one on Miami Beach?
A. I am just familiar with it; but I mean, I have thought of it.
Q. Do you think you could give both sides a fair trial?
A. I mean, as far as concerning this person, you know, this charge now, I really couldn't tell you.
Q. Are you familiar with the defendant?
A. From past newspaper articles, yes, I am.

(TR. 1232)

Q. Do you know about other things concerning the defendant?
A. Yes, from the newspaper.
Q. And you feel that will control your verdict in this case?
A. I really couldn't say. I do have an opinion on it, from past experience.
Q. That opinion, you feel, is pretty strong?
A. It's pretty good—kept a little glance at the cases—it's pretty strong.

• • • •

(TR. 1233)

Q. Let me ask you this, sir:

Do you feel, Mr. Clark, that you can judge this case on the testimony and the evidence that comes from the witness stand; will you do that?
A. I really don't think so; because, like I say, I have a strong opinion of the man now.
Q. Well, if you have an opinion, would you let that opinion yield to the testimony and evidence that comes

from the witness stand, or would you stick to your opinion?
A. Well, I honestly say, I heard a lot of people saying that he was accused of things, the things he been accused of.

I really wouldn't know—my feeling toward this case, I would go by the same things.
Q. Do you feel that opinion would yield to the evidence, or is your opinion so strong that that is about it?
A. What I am saying, my opinion is strong.

I have heard from other cases, and that, you know.

(TR. 1234)

Q. Do you feel that you could treat—
A. I wouldn't be impartial—I really don't think so. I really don't know; but I don't think I could be.

• • • •

(TR. 1236)

BY MR. NAGELEY:

Q. Mr. Clark, what is your opinion?
A. Of what?
Q. What is your opinion of Mr. Murphy?
A. I wouldn't know.

Due to past articles in the paper, things like this nature, well, my opinion is that he has been guilty of some unlawful activities, and that he has been charged with these unlawful activities; and he has been, you know—the law has taken care of them.

(TR. 1237)

Q. What you said earlier, I believe, in answer to Mr. Jacobs' question, was that he had done similar things, and you have got an opinion about this, and that he is guilty; right?
A. Well, I will more than likely say that he is guilty, that he be guilty because of some activities that he was involved in—almost the same thing that he is involved in now.
Q. Right; and your knowledge, your experience is such that you couldn't give him a fair and impartial trial?
A. It is of such.

MR. NAGELEY: Challenge for cause.
THE COURT: Granted.

• • • •

EXCERPTS FROM THE TESTIMONY OF WILLIAM ETHIER

(TR. 1244)

Under the law, every person charged with a crime is presumed to be innocent—not an absolute fact, but the law says we presume a man innocent until the State proves his guilt to you beyond and to the exclusion of every reasonable doubt.

Will you give Jack Roland Murphy the benefit of this presumption of innocence?

A. In light of what I have read for two years I will be very honest with you.

(TR. 1245)

I don't believe that I could guarantee any such.

Q. Would you do this—

A. I am familiar with the principle; but in this particular case, as I say—

Q. You have an opinion in this case?

A. Yes.

Q. Now, would you let your verdict in this case be dependent on the evidence and testimony from the witness stand, and the law that the Judge will give you?

A. To as much degree as is humanly possible.

I think subconsciously I have a predetermined opinion.

Q. Would you let that opinion yield to the evidence in this case?

A. That is a presumption I really couldn't make you, to be honest with you.

Q. You are the only one that can look in your own mind.

A. I really mean it.

(TR. 1246)

Q. Do you think your settled opinion is so strong that no matter what, you would be totally unable to give this defendant a fair trial?

MR. NAGELEY: Objection. This is not the test.

MR. JACOBS: I think it is.

THE COURT: Overruled.

MR. JACOBS: You may inquire, Mr. Nageley, in a moment.

MR. ETHIER: In my position, I am closely associated with law enforcement agencies—FBI, CIA, and Treasury in Washington.

I have a leaning towards that, in other words, to that side.

Very frankly, from what I have read, from what has been discussed and what has been in the papers, what has been on TV, frankly, I have an opinion.

BY MR. JACOBS:

Q. My question is, is that opinion so strong that no matter what, you could not give this defendant a fair trial?

(TR. 1247)

A. Who is to say?

Q. I am not arguing with you, sir.

A. I believe it would be, yes.

MR. JACOBS: No further questions.

MR. NAGELEY: Challenge for cause.

THE COURT: Denied for cause thus far.

BY MR. NAGELEY:

Q. Mr. Jacobs says no matter what you heard, your opinion wouldn't yield; and your answer was, you weren't sure; right?

Now, we are not talking about metaphysical possibilities, or mathematical situations that are in the infinite. We are getting down to the nitty-gritty.

A. That's right.

Q. Right. Your opinion is such that you wouldn't give him a fair and impartial trial; is it that simple?

A. Yes; it is.

MR. NAGELEY: Right. No further questions.

EXCERPTS FROM THE TESTIMONY OF MARY J. KANE

(TR. 1262)

Q. And, have you ever heard of Murph the Surf prior to coming in here for jury duty?

(TR. 1263)

A. Not as much as I have heard it here.
Q. You have heard of him, though?
A. Yes.
Q. When you think of Murphy the Surf, you don't think of a toe dancer; do you?
A. No.
Q. You think of him as a criminal; don't you?
A. Not at this point.
Q. Not at this point?
A. No.
Q. Do you get the Miami Herald at home?
A. Yes, we do.
Q. Have you read articles in the Miami Herald about Murph the Surf?
A. I have at times.
Q. Now, I show you, from Monday of last week—have you read the articles?
A. I may have read one or two, telling where they were picking jurors.

(TR. 1264)

Q. Right.
Directing your attention to the Miami Herald article dated July 28, 1970, marked Defendant's Exhibit A-2, for Identification, entitled, "Manicured Murph Stars in Court," did you see that article, ma'am?
A. Yes, I did.
Q. Did you read it?
A. Yes, I did.
Q. Do you know from that article that Murphy is a convicted murderer of two secretaries in Broward County?
A. Not from that article, I didn't. I don't recall whether I did or not.
Q. That article states, further down, a paragraph: "Now settled in for life at Raiford, Murphy is considered the most promising in a painting class of twelve."
A. That's right, I have.

(TR. 1265)

Q. So you know that he is serving life.
A. Yes.
Q. You know he is a convicted murderer; right.
A. Yes.

Q. I show you Defendant's Exhibit A-3 for Identification, an article appearing in the Miami Herald on July 30th of 1970, entitled, "Murphy Jurors Rejected."
Did you see that one, ma'am?
A. No, I didn't.
Q. Okay.
A-4 for Identification, Miami Herald article entitled, "Defense Exhausts Challenges in Murphy Trial."
A. Yes, I read that one.
Q. That is the one that says:

"Jury selection will continue today in the trial of beach-boy hoodlum who is serving life for murder in connection with the Whisky Creek slaying of two secretaries in 1968."

(TR. 1266)

A. Yes, I did.
Q. I show you A-5 for Identification "Murphy Jury Still Unseated."
A. That is it.
Q. And, frankly, A-6 for Identification, "Two Impaneled in Murphy Case."
A. Yes.
Q. Now, you have heard of Murph the Surf prior to coming in here; is that correct—without having read those articles?
A. I have?
Q. And, were you living in Dade County, Florida, or in South Florida, during the period from January 28, 1968 to the present time?
A. Yes.
Q. You have been getting these articles all that time?
A. Yes, same address.
Q. You have been listening to the news all that time?
A. Yes.

• • • •

(TR. 1268)

Q. Now, ma'am, is it the correct interpretation of your prior statement to say that you would give the same fair and impartial treatment to a convicted killer as you would to another person?

A. I don't know.

At this point, I couldn't answer that truthfully.

Q. Thank you.

So, you have heard of Murphy the Surf. You have heard all about him, and you have heard about him in the news media.

(TR. 1269)

Even though Judge Stedman asked you to follow the law, you would still have that knowledge of Murphy in your mind; right?

A. I have.

Q. And isn't it a fact, ma'am, that you can't render a fair and impartial verdict in this case, because you know all about the guy?

A. No, I wouldn't say that.

• • • •

(TR. 1279)

Q. The question is, would you compromise your verdict; could you go there—and say the State proved his guilt and the defense proved that he was insane, but, "I'm not going to let that guy walk the streets, so I'm going to find him guilty, period?

(TR. 1280)

Would you do that?

A. I don't know at this point.

Q. Right.

So in fact, ma'am, at this point you cannot tell us whether you can give a fair and impartial deliberation about Murphy, number one, because of the lack of evidence; and number two, because of what you know about Murphy; isn't that a fact.

A. Yes.

• • • •

EXCERPTS FROM THE TESTIMONY OF ALEX C. ELLIS

(TR. 1328)

Q. Okay, that's all I wanted to know.

Mr. Ellis, the defendant is under the law presumed innocent. It is not a statement of fact; the law presumes every man to be innocent.

Will you give this defendant the benefit of that presumption?

A. I hope I can, yes. I feel pretty strongly, naturally, what you read—you are bound to come to some opinion.

(TR. 1239)

Q. But the question is I want to ask you, your opinion isn't so strong that you won't listen to the evidence and the testimony and base your verdict on that evidence and testimony?

A. No, sir.

Q. If you have an opinion, that opinion will yield to the testimony and evidence and that law that the Judge gives you; won't you?

A. To the best of my ability.

Q. You can give this defendant a fair trial?

A. I feel I can.

• • • •

(TR. 1394)

Q. Did you ever hear the name of Murph the Surf before?

A. Yes.

Q. Many times, right?

A. Many times.

Q. Tired of hearing it; aren't you?

A. Sure am.

Q. So am I.

(TR. 1350)

Now, sir, when you think of Murph the Surf, you don't think of a toe dancer; you don't think of the head of the Greater Miami Crime Commission; you don't think of a priest; you don't think of anybody reputable, do you?

A. No.

Q. In what relation do you consider him?

A. Consider him a habitual criminal, for whom there's no hope of rehabilitation.

That is exactly the way I feel.

• • • •

(TR. 1351)

A. If the evidence—in other words, if he was actually caught, placed at the scene of the crime at the time, I would say that there is no reason in the world—my feelings—other than it's our form of justice, to give him a trial.

But to me, it's a waste of the taxpayers' time and money.

Q. Did you see Kofoed's article last week in the Miami Herald, where he says that the Murphy trial is a waste of the taxpayer's money?

A. No, sir; I didn't.

Q. Have you read the articles in the Miami Herald the last two weeks about this case?

A. I might have read them.

Q. That Murphy is a convicted killer?

A. Yes.

Q. You know that he was convicted up in Broward for killing that girl?

(TR. 1352)

A. Yes.

Q. The theft of a half-a-million dollars in securities, do you know about that?

A. Vaguely.

Q. Do you remember about Judge Stedman making a ruling regarding Murphy's competency to stand trial; do you remember reading about that?

A. I remember.

Q. Did you express an opinion about that, as to Murphy's sanity?

A. Did I?

Q. Did you ever?

A. Well, I expressed about the same opinion I have expressed here today.

Q. Right.

Seriously, sir, as you sit here, do you think Murphy is insane?

A. I don't think so.

Honestly, I am not in the position to judge one way or the other.

Q. But you were—

(TR. 1353)

A. I don't think he is any more insane than any other criminal.

• • • •

(TR. 1354)

That is not enough, sir. The thing is, when you go into that jury room, your opinion about Murphy is so fixed that you can't give him a fair and impartial trial; isn't that a fact, sir?

A. I would rather not serve on this particular case.

Q. Because of that reason?

A. Because I do feel very strongly about it.

But I insist that I will do it to the best of my ability.

• • • •

(TR. 1355)

Q. Sir, you were called to jury duty last Wednesday; were you not?

A. Last Wednesday a week ago.

Q. And you were milling with other jurors, in and among other jurors in the jury room down there; were you not?

A. Yes, sir.

(TR. 1356)

Q. On the fourth floor here?

A. Yes.

Q. The jurors were talking about this case, weren't they?

A. Oh, yes.

Q. And not only were they talking about the case, but the jury panel was of the opinion that Murphy was guilty; right?

A. The ones I have talked to, yes.

Q. Now, sir, before you reported here Wednesday a week ago, you had a fixed opinion about Murphy; right?

A. Yes.

Q. And, the jury panel reinforced that opinion—and these were strangers you never met before—agreed with your opinion that he is guilty; right?

A. Yes.

Q. Now, some of those persons with whom you have milled and talked are already selected, on a panel, the seven.

Now, could you go in there with those same people who already expressed an opinion about Murphy's guilt and say, "Let's give him a fair and impartial trial?"

(TR. 1357)

A. I don't believe they have been selected. I don't know of any—there was so many in there. I have yet to talk to any that didn't feel more or less the same way I feel.

Q. So, the panel was generally, from your point of view, of the same opinion you are—that he is guilty, a habitual criminal; right—he is rotten?

A. The ones I have talked to; yes. I haven't talked to that many.

Q. You didn't hear anybody express a contrary opinion, that he was a great guy?

* * * *

(TR. 1361)

Q. And you cannot obliterate from your mind in truth and in honesty, under your oath as a juror, your oath under God, sir, you cannot say that you can give Murphy a fair and impartial trial; isn't that a fact?

A. I stated before, I would rather not serve on this case; but if I am selected, I will just do the best of my ability.

Q. Your desire not to serve is because, sir, you do not believe that you can be a fair and impartial juror as you would like to be?

(TR. 1362)

A. That's right.

* * * *

EXCERPTS FROM THE TESTIMONY OF FRANK D. COOK

(TR. 1462)

Q. Mr. Cook, will you give this defendant a fair trial?

A. Yes.

MR. JACOBS: You may examine, sir.

(TR. 1427)

Q. Do you want to qualify your last answer, in regard to giving the defendant a fair trial?

A. I don't understand what you are asking me, sir.

Q. There was some air of uncertainty about your answer. You didn't say yes, absolutely. You seemed to be saying, yes, but I have reservations.

Do you?

A. Yes.

Q. Would you express them, please?

A. Well, anybody that has lived in Dade County has read a good bit about the trial; and from what I have read, I have made up my mind probably that the man is guilty.

A. All right, that's all we want to know.

* * * *

EXCERPTS FROM THE TESTIMONY OF JACK ETHERIDGE

(TR. 1444)

When you think of Murph the Surf, do you think of some lofty professional like Albert Schweitzer, trying to benefit society?

Do you believe he is a Federal District Judge upholding the law?

Is he a ballet dancer, is he a criminal, a mafia, a convicted killer, what?

A. Well, I associate him with being a criminal.

(TR. 1445)

Q. I see.

Now, how long have you held that knowledge; how long have you associated him as being a criminal?

A. Since he was convicted of present.

Q. What was that, sir?

A. Murder.

Q. Do you know where that was?

A. I'm not sure—in Broward County?

Q. Broward County, right.

And, how long ago was that; do you recall?

A. No, sir, I don't.

• • • •

Q. Do you listen to the news on radio or TV?

(TR. 1446)

A. Yes.
Q. Do you have a TV in your home?
A. Yes.
Q. Radio in you car?
A. Yes.
Q. Have you heard the name Murph the Surf on the news on the radio and TV?
A. Yes.
Q. Getting a little bit tired of the name; aren't you?
A. No.

• • • •

(TR. 1447)

Q. And you will presume him to be innocent, is that correct:
A. Yes, sir.
Q. Now, is that presumption not watered down and diluted by the fact that you know he is a convicted criminal?
A. No.

(TR. 1448)

Q. Not at all?
A. No.
Q. Amazing.
Do you know of Murphy in any other particular, other than the Whisky Creek murder?
A. Something about some ruby some years back.
Q. The Star of India, the DeLonge ruby; right?
A. Yes.

• • • •

(TR. 1449)

Q. Do you know anything about Murphy's being adjudged incompetent to stand trial by Judge Stedman?
A. Yes, I heard it. When the ruling was made. I heard it on the news.

Q. As a matter of fact, the news blew the lid off of it.
A. Right.
Well, I heard it.

• • • •

Q. Have you ever heard the hue and cry of the community because Murphy was adjudged incompetent to stand trial?

(TR. 1450)

MR. JACOBS: Same objection—does not go to the qualifications of the juror.
THE COURT: Overruled.

BY MR. NAGELEY:

(TR. 1450)

Q. Answer the question; is that correct?
A. Yes.

• • • •

(TR. 1451)

Q. And you didn't hear anybody say that Murphy was guilty?
A. Yes, I heard it.

(TR. 1452)

Q. How many people?
A. I don't know—half a dozen.
Q. Would you say that a consensus of the prospective panel was that Murphy is guilty?
A. No.

• • • •

SUPREME COURT OF THE UNITED STATES

No. 74-5116

JACK ROLAND MURPHY, PETITIONER

v.

FLORIDA

ORDER ALLOWING CERTIORARI—Filed December 23, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

ORIGINAL COPY

NO. 74-5116

JACK ROLAND MURPHY,
Petitioner

vs.

STATE OF FLORIDA,
Respondent

ON PETITION FOR WRIT OF CERTIORI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 495 F.2d 553.

JURISDICTION

The jurisdictional requisites are set forth in the petition.

QUESTION PRESENTED

WHETHER A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE OPINION BELOW WHICH HELD THE FAILURE TO GRANT PETITIONER'S MOTION FOR CHANGE OF VENUE WAS NOT A DENIAL OF DUE PROCESS WHERE PUBLICITY WAS FACTUAL RATHER THAN INFLAMMATORY AND OCCURRED AT LEAST A YEAR AND A HALF PRIOR TO TRIAL, AND JURORS WHO KNEW OF PRIOR CONVICTIONS EACH SATISFIED THE COURT OF THEIR IMPARTIALITY?

STATEMENT OF THE CASE AND FACTS

The respondent adopts the factual statement as set forth in the opinion of the court below.

ARGUMENT

Petitioner's burden in seeking to overturn a state criminal conviction in a federal court is to show "essential unfairness.. not as a matter of speculation but as a demonstrable reality." United States ex rel Darcy v. Handy, 351 U.S. 454 (1956). A violation of rights of constitutional proportions occurs only if the defendant was not tried by an impartial jury. Beck v. Washington, 369 U.S. 541, 556 (1962). In Beck v. Washington, the Court stated that the criteria for reversal of a state conviction by a federal reviewing court is not met unless the jurors' inability to render an impartial verdict is so clear as to pass beyond the realm of disputable fact and to become "a matter of law". Id. at 557.

Since 1964, the petitioner had received national publicity as one of the perpetrators of the "Star of India" theft from the New York Museum of Natural History. His notoriety stemming from this crime, having received nationwide press attention, could not have been avoided by a change of venue. Petitioner received additional publicity, however, from his conviction on March 1, 1969, for the murder of Terry Rae Kent Frank, one of the "Whiskey Creek Murders" and from his indictment by a federal grand jury on charges of conspiring to transport stolen securities in interstate commerce, charges related to the Whiskey Creek case.

It is highly significant here that all of the state and federal courts which have reviewed the press reports here complained of have concluded that they were for the most part factual accounts, and were neither highly colored nor inflammatory. The refusal of the state appellate court and the federal courts below to grant relief on the basis of prejudicial publicity is supported by the United States Court of Appeals for the Second Circuit in United States v. Agueci, 310 F.2d 817, 832 (1960):

> "The typical jury, in this age of mass-communications, is not hermetically sealed from the events occuring all about them. Of course, an effort must be made by the trial judge to caution jurors against considering extra-judicial statements pertinent to the guilt or innocence of the individuals upon whom they sit in judgment. Where the cautionary instructions are adequate, as they were here, and where the news reporting was merely routine and hardly inflamatory, the trial judge does not abuse his discretion by refusing to declare a mistrial. (Citations omitted). "Trial by newspaper may be unfortunate but it is not new and, unless the court accepts the standard judicial hypothesis that cautioning instructions are effective, criminal trials in the large metropolitan centers may well prove impossible." United States v. Leviton, 193 F2d at 857.

It should also be noted that the petitioner's own exhibits filed in the lower courts show the dates on the great majority of these newspaper clippings to prove publication was between December 15, 1967, and January 24, 1969. Jury selection in the case at bar began on July 27, 1970. Only five (5) articles have been presented by the petitioner bearing dates of the period of the jury selection and of these only one was sufficiently newsworthy to warrant coverage on the front page of the paper's second section. The remaining articles appeared on the paper's back pages.

Each juror was examined and each expressly disavowed that he or she would be influenced in their deliberations by any publicity surrounding the petitioner. Petitioner is therefor in the position of contending that publicity which surrounded him a year and a half to three years prior to trial, with some lesser publicity at the time of trial, must be conclusively prejudicial, in spite of the jurors' assurances to the court that they would reach a verdict based solely on the evidence presented at trial.

The question of whether each juror who possessed knowledge of petitioner's previous felony convictions should have been excluded for cause does not present a substantial federal question on the facts of the instant case. Marshall v. United States, 360 U.S. 310 (1959), decided as an aspect of this Court's inherent supervisory powers, does not require that a juror be automatically discharged if he has knowledge of a defendant's past felony convictions, especially where that juror has otherwise satisfied the requirements of impartiality. While United States ex rel Doggett v Yeager 472 F2d 229 (3rd Cir., 1973) is cited as directly conflicting, Doggett involved decidedly different facts. The publicity therein concerned a previously withdrawn guilty plea to the very same crime for which Doggett was then on trial. The publicity did not concern prior convictions. While the reasoning of the Third Circuit suggests that Marshall, supra, is now applicable as an aspect of due process as well, this Court has not so extended Marshall, and neither has any other federal Court of Appeals. Where as in the present case a guilty plea to the crime charged is not in issue, and the jurors have all given assurances of impartiality, reversal under Marshall as an aspect of due process is unwarranted.

CONCLUSION

On the facts of the instant case an insubstantial federal question has been presented, and therefore it is respectfully submitted that this Court should deny the requested petition.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1974

NO. 74-5116

JACK ROLAND MURPHY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner's Reply Brief

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I

WHETHER, THE PETITIONER, WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE OF THE STATE TRIAL COURT'S FAILURE TO GRANT PETITIONER'S PRETRIAL MOTION FOR A CHANGE OF VENUE, OR TO EXCLUDE CERTAIN PROSPECTIVE JURORS BECAUSE:

(A) ALL OF THE PROSPECTIVE JURORS EXAMINED HAD OBTAINED KNOWLEDGE FROM THE NEWS MEDIA PRIOR TO THEIR EXAMINATION IN COURT THAT THE PETITIONER HAD BEEN PREVIOUSLY CONVICTED OF EITHER, BREAKING OR MURDER IN THE FIRST DEGREE.

(B) ALL OF THE PROSPECTIVE JURORS HAD BEEN SUBJECTED TO EXTENSIVE NEWS MEDIA COVERAGE FOR MORE THAN THREE YEARS, CONCERNING NOT ONLY THE FACTS OF THE CASE WHICH IS NOW BEFORE THIS COURT, BUT ALSO FACTS SURROUNDING TWO MURDERS WHICH OCCURED SHORTLY BEFORE THIS CASE AND SEVERAL PUBLICIZED LOCAL AND STATE INVESTIGATIONS DEALING WITH PETITIONER'S BEING RELEASED ON BOND AND WITH A RULING BY THE TRIAL COURT DECLARING PETITIONER INCOMPETENT OR INSANE.

STATEMENT OF THE CASE AND FACTS

Both the history of this case and the facts have been set forth in Petition for Writ of Certiorari.

ARGUMENT

The Respondent's contention with regard to Question 1(A) of the Petition is simply that while Marshall v. United States, 360 U.S. 310 (1959) is factually indistinguishable from this case, no appellate court or this Court ever stated that Marshall " is now applicable as an aspect of due process". The Respondent conceeds that the 3rd Circuit in United States ex rel. Doggett vs. Yeager,

472 F. 2d 229 (3rd Cir., 1973) is the only exception but suggests that said case is not applicable here because it involved different facts.

It is clear from a reading of Respondent's brief that it has failed to comprehend the precise issue before this Court. It is also evident that Respondent failed to consider the cases set forth in the Petition for Writ of Certiorari.

The gut issue here is whether the information which the jurors received through the news media prior to trial, to-wit: That Respondent had recently been convicted of murder and had years before been convicted of a sensational jewel theft was so prejudicial on its face that notwithstanding each jurors assurance of impartiality, said juror should have beenexcused for cause. And the failure of the Trial Court to either excuse said juror or grant a Change of Venue constituted a denial of due process and equal protection of the laws.

Nowhere is its brief does the Respondent ever argue that the jurors' knowledge of Petitioner's prior convictions is not prejudicial. The thrust of its argument is that so long as jurors give assurances of impartiality, there is no error committed in not excusing them. Such is not the law.

This Court in Marshall v. United States, supra, recognized that information of prior convictions is so prejudicial, that even with jurors assurances of impartiality, the jurors must be excluded. The Respondent's argument asks this Court to accept a double standard of prejudice. They argue that although such information may be prejudicial in Federal cases, it does not reach the proportions of prejudice to argue a violation of due process and equal protection of the laws. However, in a series of decisions by this Honorable Court , some citing Marshall v. United States, supra, the Respondent's argument is clearly rejected. See Irvin v. Dowd, 1961, 366 U.S. 717, 81 S. Ct. 1639, 6 L.Ed.2nd 751; Rideau v. Louisiana, (1963) 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663; Sheppard v. Maxwell, 1966, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600.

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A review of this case by this Honorable Court is clearly reflected by the nature of the question presented. The opinion of this Court will affect every defendant in a criminal case who seeks to have his case tried by a jury.

CONCLUSION

For the reasons set forth in this brief as well as the Petition for Writ of Certiorari, previously filed, the Petition for Certiorari should be granted and the Judgment of the Court of Appeals reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1974

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Respectfully submitted,

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Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1974

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v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The petitioner advanced his claim of an Unfair Jury Selection and denial of Due Process in a direct appeal to the Appellate Court, Third District, of the State of Florida. The opinion is reported at 252 So.2d 385 (Fla. App. 1971).

The opinion of the United States District Court dismissing the petition for writ of habeas corpus is reported at 353 F. Supp. 1224 (1974). The opinion is also contained in the Appendix at 40.

The opinion of the Court of Appeals for the Fifth Circuit, affirming the District Court's order of dismissal is reported at 495 F.2d 553 (1974) and is contained in the Appendix at 51.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on June 10, 1974. App. at 51. The petition for a rehearing by the Court en banc was denied July 12, 1974. App. at 59.

The Petition for a Writ of Certiorari and Motion to Proceed in Forma Pauperis were docketed August 12, 1974 and granted December 23, 1974.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Petitioner's constitutional right to a fair and impartial trial by Jury was violated by the Court's failure to grant Petitioner's pretrial motion for a change of venue, or to exclude certain prospective jurors because:

A. Each of the jurors examined had obtained knowledge from the news media that the petitioner had been previously convicted of either, breaking and entering or murder in the First Degree.

B. Each juror had been subjected to extensive news media coverage over a period of three years, concerning not only the facts of the crime petitioner was on trial for, but also facts surrounding two murders, and several publicized local and State Investigations dealing with Petitioner being released on bond and being declared incompetent or insane.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the Constitution of the United States of America:

> "... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The petitioner, Jack Roland Murphy, hereinafter referred to as the defendant, was convicted in The Criminal Court of Record, Dade County, Florida, and sentenced to life imprisonment for Breaking and Entering a dwelling with intent to commit a felony, to-wit: Robbery; and twenty years for Assault with intent to commit a felony, to-wit: Robbery.

By motion, the defendant attempted to change the venue of the trial because of pretrial publicity. The defendant also attempted to excuse all jurors examined who had knowledge of his past criminal convictions.

1. The Pretrial Proceedings

On January 8, 1968, the defendant, along with two others were arrested for breaking into the house of Mrs. Olive Wofford and robbing the occupants therein. The case was originally filed as case number 68-530 in the Criminal Court of Record in and for Dade County, Florida.

While case No. 68-530 was pending the defendant, after a lengthy sanity hearing was declared incompetent by the Court. This ruling by the trial court resulted in numerous news articles and the beginning of several state and local investigations into the Court's ruling defendant incompetent. (R. 87-95; 118-121; 126; 134)

Also, while case No. 68-530 was pending, defendant filed a motion for change of venue because of the pretrial publicity (App. 17).

While all of the legal proceedings were taking place in case No. 68-530, the defendant was arrested and indicted for the double murder of Terry Rae Kent Frank and Annalie Mohn. These killings became notorious in the press as the "Whiskey Creek Murders", (R. 86-156).

Because of the trial Court's ruling declaring the defendant incompetent to stand trial, Richard Gerstein, the State Attorney, voluntarily entered a nolle prosequi in case No. 68-530, thereby allowing the Broward County State Attorney to proceed with the "Whiskey Creek Murder Case". (R. 100).

On August 14, 1968, the defendant along with three others were indicted in federal case No. 68-360 CR-JE, with conspiring to transport stolen securities from Los Angeles, California to Miami Beach, Florida. This case was closely related to the "Whiskey Creek Murder case".

On March 1, 1969, the defendant was found guilty of the murder of Terry Rae Kent Frank. On August 25, 1969, the Dade County State Attorney refiled the Wofford robbery charges against the defendant, which case number was 69-7464, and which is the subject matter of the petition before this Court.

In December of 1969, the defendant plead guilty to Count I of the Federal Indictment in case No. 68-360 CR-JE.

On July 17, 1970, the defendant filed a Motion for Change of Venue in the second Wofford robbery case. (App. 30).

2. The Jury Selection

On August 27, 1970, the jury selection began. Seventy-eight jurors were questioned by counsel. Of the 78 jurors questioned, the defendant excused 12 pre-emptorily; 27 were excused for either medical, family or economic reasons; 3 were excused for various other reasons; 20 were excused because they had formed an opinion via the news media that the defendant was guilty and they could not render a fair and impartial verdict. The prosecution pre-emptorily excused 8 jurors.

Of the six regular and two alternate jurors selected (none of which were acceptable to the defendant), their knowledge of the defendant, his background and the facts of the case were extensive.

Five of the eight jurors stated that the jury panel had been discussing the defendant and the case and many had formed an opinion that the defendant was guilty.

(App. 158).[1] Six of the eight jurors knew that the defendant had been indicted in the "Whiskey Creek Murder case" and had been convicted of first degree murder. (App. 102, 119). Six of the eight jurors knew that the defendant had previously been a defendant in the theft of the "Star of India and Delong Ruby" from a New York Museum. (App. 60). All of the jurors knew that the Petitioner was a convicted felon and was currently serving time for murder, or had served time for being involved in jewel thefts. (App. 60).

All of the jurors stated that their knowledge of the defendant came from the news media, i.e., radio, television, and newspapers. (App. 60). Four of the eight jurors testified that they had been reading the various articles in the newspapers printed during the week of jury selection. (App. 60). Four of the eight

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[1] Q. Now, did you hear any of the panel, prospective panel, discussing the Murph the Surf case?

A. Sure.

Q. And, would you tell us generally what was the nature of the discussions?

A. Well, it's just – talk.

I would seriously – I would say that I thought that some of the discussions that I overheard, that the people involved with, seriously, from what I heard, made me sick to my stomach.

Q. What were they saying?

A. You know, his guilt or innocence.

I really don't know which people feel that way.

If I believe in the system, I can't believe this.

Q. But tell us what the comments were that caused you to feel sick to your stomach?

A. Like, 'Hang him, he's guilty.' This kind of thing. (App. 158).

jurors were familiar with prior rulings of the Court concerning the controversial ruling over defendant's competency to stand trial. (App. 60).

Prior to and during jury selection, the trial court took no steps to insulate the jury from news coverage of the case. At no time were the prospective jurors instructed not to read or listen to the news or to discuss the case amongst themselves. (App. 90, 100).

After the jury was selected, but prior to their being sworn, defendant renewed his Motion for Change of Venue. In support of the motion, defendant introduced the following exhibits into evidence in support of the motion:

1. Defendant's Exhibit "F" which was an Order dated July 8, 1968, removing the trial of the co-defendants in this case to another county because of the Court's failure to control publicity surrounding the case. (App. 32).

2. Defendant's Exhibit "G" which was a hearing on a Motion to Change Venue in the United States District Court for the Southern District of Florida, Case No. 68-360 dated March 6, 1969. (App. 34).[2]

3. Defendant's Exhibit "H" entitled "Order of Transfer" wherein the United States District Court, on

---

[2] The Court. People in this County can tell you who Murphy is, who would not have the slightest idea who Earl Faircloth is, and I think that is a fair statement.

* * * * *

The Court. . . . I am not trying to be funny about it, but it is perfectly obvious, for weeks after the matter with Judge Stedman, his ruling, I could not go to a social event. I would want to sit down and talk about the Dolphins, but everybody there wanted to ask me about Murph the Surf. It was just the topic of conversation (App.).

April 21, 1970, (more than a year after the hearing set out in footnote 2, and just three months prior to the trial in the case sub judice), transferred case No. 68-360 to Pensacola, Florida for trial.

Notwithstanding all of the exhibits and the difficulty in selecting an impartial jury, the trial court denied the motion to change venue, as well as the motion to exclude jurors with knowledge of the defendant's past criminal record. (TR. 1493).

3. The Verdict And Appeals

On August 21, 1970, the jury found Murphy guilty on both counts of the information. The Court imposed a sentence of life on one count and twenty years on the other count. (R. 2656).

Murphy appealed his conviction to the District Court of Appeals of Florida, Third District. He urged the Court to order a new trial based upon the selection of a prejudiced jury and that his constitutional right to a fair and impartial trial by jury was violated. The Appellate Court affirmed the conviction and sentences. *Murphy v. State*, 252 So. 2d 385 (Fla. App. 1971) (App. 5).

On January 28, 1973, Murphy filed a Petition for Writ of Habeas Corpus in the United States District Court Southern District of Florida, contending that he was denied due process of law by the trial court's failure to grant his pretrial motion for change of venue or to exclude jurors with knowledge of defendant's criminal record. The District Court rejected Murphy's contention. *Murphy v. State*, 363 F. Supp. 1224 (1974) Murphy then filed Motion for leave to Proceed in

Forma Pauperis and for a certificate of probable cause. The United States District Court granted both. The Notice of Appeal was then filed with the United States Court of Appeals for the Fifth Circuit. The United States Court of Appeals for the Fifth Circuit affirmed the Judgment of the District Court. *Murphy v. State*, 495 F.2d 553 (1974). Murphy then filed this Petition for Certiorari in the Supreme Court of the United States which Petition was granted on December 23, 1974.

ARGUMENT

I.

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A trial by jury in a criminal case is fundamental to the American scheme of justice, and the Fourteenth Amendment to the United States Constitutional guarantees both a right of jury trial in all criminal cases, *Duncan v. State of Louisiana*, 391 U.S. 145 (1968), and a right to a jury trial with a jury which is fair and impartial. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

As reflected by the Record and Appendix in this case the eight jurors who convicted the defendant, knew he had been convicted of either a jewel theft, murder, or

possession of stolen securities and that during the trial he was incarcerated in a state prison. Persons who obtain such knowledge from the news media cannot fairly and impartially sit as jurors in a criminal case.

A. Admissibility of An Accused's Criminal Record And The Prejudicial Nature of Such Evidence

Under Florida law the only proper way of introducing prior convictions is in an attempt to impeach or discredit the defendant's character, should he offer evidence in his own behalf at the time of trial. *Florida Statutes*, § 90.08 and Florida Rules of Evidence, § 99 (1967). The same rule applies in the Federal Courts. *Davis v. United States*, 413 F.2d 1226 (5th Cir. 1969) and *United States v. Stallings*, 437 F.2d 1057 (5th Cir. 1971). The reason for the rule is quite evident. Information of prior convictions is extremely prejudicial to the accused. Jurors are permitted to have knowledge of such facts only under limited situations. The prejudicial nature of such information was expounded upon by this Court in *Marshall v. United States*, 360 U.S. 310 (1959). In *Marshall, supra*, the defendant was charged with unlicensed dispensing of drugs. During the trial, defendant never took the witness stand. Also during the trial, newspaper articles containing information about the defendant's past criminal record reached members of the jury. In reversing the conviction, the Court said: (at 360 U.S. 313-314).

> "... we have the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great, when the evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence ..."

The defendant is well aware that in *Marshall v. United States, supra*, the Court's action was taken in that direct criminal appeal pursuant only to its inherent supervisory powers and not in terms of due process standards. The United States Court of Appeals for the Fifth Circuit in affirming the decision of the United States District Court, incorrectly distinguishes *Marshall v. United States, supra*, on this point.[3] This portion of the Court's opinion fails to take into consideration the decisions of this Court and of the other United States Courts of Appeals since the ruling in *Marshall v. United States, supra*.

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[3] Although the situation in Marshall is factually similar to the instant case, the rationale of that opinion militates against Petitioner's position. The Court, then, finds that a trial by jurors, each of whom has obtained knowledge of a defendant's past felony convictions through pretrial publicity, does not, in light of the Supreme Court's refusal to so find, raise to constitutional proportions when each juror has satisfied the impartiality requirements set forth in *Irvin v. Dowd, supra*. The Court recognizes that the distinction between acts or occurances which warrant the exercise of federal supervisory powers and those which reflect the denial of due process is often a nebulous one. Nevertheless, the dictates of federalism compel this court to abide by the distinction whenever it exists. Petitioner's claim regarding the effect of pretrial publicity must fall. (App. 57).

B. A Defendant Need Not Show Prejudice And Jurors Mere Assurances Of Impartiality Is Not Sufficient Where They Have Learned From News Media Of Accused's Prior Criminal Record.

Prior to 1959, the federal courts applied the same standards in prejudicial publicity cases, whether the case arose in either the state or federal courts. That rule required an actual showing of prejudice by the defendant. However, in 1959, *Marshall v. United States, supra,* as previously quoted, changed that rule but only in the federal courts, holding that even though jurors stated they would not be influenced by prejudicial articles, the court reversed on the basis that the publicity of past criminal record in and of itself was so prejudicial that it required reversal of the petitioner's conviction.

In *Irvin v. Dowd,* 366 U.S. 717, 728 (1961) this Court reaffirmed the view announced in *Marshall v. United States, supra,* to-wit; that prejudicial infection of a jury is not cured by statements of the individual jurors that they "would be fair and impartial to petitioner". It should be pointed out that the publicity dealing with the defendant's past criminal record was also cited by the Court in *Irvin v. Dowd,* 366 U.S. 725.[4] Of importance also is the fact that in *Irvin v. Dowd, supra,* the Court was not dealing with a federal criminal prosecution, but was before the Court as a result of a habeas corpus petition filed by a state prisoner.

[4]"These stories revealed the details of his background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on A.W.O.L. charges during the war. . . ."

In *Rideau v. Louisiana,* 373 U.S. 723, 727 (1963), which was another state court action, the court found that it was not necessary to show actual prejudice, and furthermore, it was not even necessary to show that the prejudicial material had ever reached the entire jury panel. If information was prejudicial and widespread in the community, the defendant without ever making an actual showing of jury prejudice was entitled to a change of venue.

In *Estes v. Texas,* 381 U.S. 532 (1965) this court held that use of television cameras in a courtroom deprived the defendant of his Sixth Amendment right to a public trial even though prejudice could not be shown. In other cases, the Court noted (at 381 U.S. 543) it

> did not stop to consider the actual effect of the practice but struck down the conviction on the basis that prejudice was inherent in it

Through these decisions, this Court has consistently rejected the principal that an accused must show actual prejudice on the basis that prejudice is often difficult if not impossible to prove.

This principal has been applied not only in pretrial publicity cases involving a denial of a change of venue, but also in cases where other constitutional rights have been involved. For example, where a defendant had been denied the right to counsel at arraignment, the Court in *Hamilton v. Alabama,* 368 U.S. 52, rejected the rationale of the lower court denying relief that the accused was not disadvantaged in any way by the absence of counsel. This Court said (at 368 U.S. 55).

> When one pleads to a capital charge without the benefit of counsel, we do not stop to determine

whether prejudice resulted. *William v. Kaiser*, 323 U.S. 471, 475-476; *House v. Mays*, 324 U.S. 42, 45-46, *Uveges v. Pennsylvania*, 335 U.S. 437, 442. In this case, as in those, the degree of prejudice can never be shown.

The rationale for presuming prejudice occurs because of the great difficulty of proving actual prejudice and is necessary for the protection of constitutional rights.

Justice Brennan stated in *Dicky v. Florida*, 398 U.S. 55 (concurring Opinion)

> Because concrete evidence that their denial caused the defendant substantial prejudice is often unavailable, prejudice must be assumed, or consitutional rights will be denied without remedy.

In June of 1966, this Court decided the case of *Sheppard v. Maxwell*, 384 U.S. 333 (1966). The Court concluded that Sheppard did not receive a fair trial consistent with the due process clause of the Fourteenth Amendment and, therefore, reversed the judgment. Although the pretrial publicity in *Sheppard v. Maxwell, supra*, did not deal with past criminal convictions, the Court in its dictum made the following comments concerning its earlier opinion in *Marshall v. United States, supra*, at pages 350-351:

> . . . freedom of discussion should be given the widest range compatible with the essential requirements of the fair and orderly administration of justice. *Pennykamp v. State of Florida*, 328 U.S. 331, 347, 66 S. Ct. 1029, 1037, 90 L.Ed. 1295 (1946). But it must not be allowed to divert the trial from the 'very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom accordng to legal procedures.' *Cox v. State of Louisiana*, 379 U.S. 559, 583, 85

> S.Ct. 466, 471, 13 L.Ed.2d 487 (1965) (Block, J., dissenting). Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed. 2d 1250 (1959), we set aside a conviction where the jurors were exposed 'through news accounts' to information that was not admitted at trial. We held that the prejudice from such material 'may indeed be greater' than when it is part of the prosecution's evidence 'for it is then not tempered by protective procedures.' At 313, 79 S.Ct. at 1173. At the same time we did not consider dispositive the statement of each juror 'that he would not be influenced by the news articles that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner, as a result of the articles.'. . .

In *United States, ex rel. Doggett v. Yeager*, 472 F.2d 229, 237 (3rd Cir. 1973) the Third Circuit Court of Appeals affirmatively recognized that *Marshall v. United States, supra*, no longer was applicable only to federal cases.

> . . . *Marshall v. United States, supra*, while factually controlling in this case, is distinguishable on the ground that involved the Supreme Court's supervisory power over a lower federal court rather than its constitutional power to enforce the Fourteenth Amendment's due process standards. But soon after 1959, it became clear that the former rule was no longer applicable in state trials. . . .

The Fifth Circuit Court of Appeals in its opinion in this case recognized that said opinion was in conflict with the view announced in *United States ex rel.*

Doggett v. Yeager, supra, (at page 4659, footnote 4).[5]

In *United States v. Isaacs,* 351 F.Supp. 1323 (N.D. Ill. E.D. 1972), the District Court reached the same decision as the Court in *United States, ex rel. Doggett v. Yeager, supra,* reached two years later, holding that "we view Sheppard as an application of the rule of *Marshall v. United States*" at page 1328.

It is clear that the opinion of the United States Court of Appeals for the Fifth Circuit in the instant case is diametrically opposed to the opinion of the United States Court of Appeals for the Third Circuit in *United States, ex rel. Doggett v. Yeager, supra.*

The rationale of the decisions cited above militates against the opinion of the Court of Appeals for the Fifth Circuit. These cases clearly establish a line of decisions beginning with *Marshall v. United States, supra,* which hold that where jurors have learned from the news media of defendant's criminal record and background; that knowledge precludes them from sitting as jurors and the Court should either excuse them from service or grant a change of venue. This action should be taken notwithstanding the jurors assurances of fairness and impartiality, and notwithstanding a failure to show actual prejudice.

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[5] We are aware of the view announced in *United States, ex rel. Doggett,* 3 Cir. 1973, 472 F.2d 229, 237-239, that *Irvin v. Dowd, supra,* and *Sheppard v. Maxwell, supra,* broadened the *Marshall* holding so as now to require that its rule be applied in state trials. While the question arose in a prejudicial publicity-change of venue setting in *Doggett,* we do not seriously doubt that the Third Circuit would apply its holding equally in a situation involving, as presently under discussion, denials of challenges for cause based on a jurors knowledge of prior convictions. With deference, we disagree with our sister circuit's conclusion and decline here to be guided by *Doggett.*

Furthermore, the opinion of the Court of Appeals in the case sub judice, fails to consider the opinion of *Duncan v. State of Louisiana,* 391 U.S. 145 (1968), wherein this Court stated that a trial by jury in criminal cases is fundamental to the American scheme of justice, and that the Fourteenth Amendment to the United States Constitution guarantees a right of jury trial in all criminal cases which, were they to be tried in a federal court, would come within the Sixth Amendment guarantee. By its opinion in *Duncan v. State of Louisiana, supra,* this Court has made applicable in all state criminal jury trials those rules applicable in federal criminal jury trials.

Thus, the rationale of both *United States, ex rel. Doggett v. Yeager, supra,* and *United States v. Isaacs, supra* is reinforced by the opinion in *Duncan v. State of Louisiana, supra.*

II.

PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL BY JURY WAS VIOLATED BY THE COURT'S FAILURE TO GRANT A PRETRIAL MOTION FOR CHANGE OF VENUE, OR TO EXCUSE FOR CAUSE JURORS WHO HAD BEEN SUBJECTED TO EXTENSIVE NEWS MEDIA COVERAGE OF THE CASE WHICH WAS BEING TRIED AS WELL AS FACTS SURROUNDING TWO MURDERS AND SEVERAL INVESTIGATIONS DEALING WITH PETITIONERS BEING RELEASED ON BOND AND BEING DECLARED INCOMPETENT.

The record before this Court amply documents the nature and extent of the pretrial publicity in both the

case at bar as well as the murder case and federal securities case. The record shows that over a period of two and one-half years, the publicity concerning the defendant was extensive and prejudicial. Defendant would agree with that portion of the Fifth Circuit opinion wherein the Court stated that there was a substantial period of time where there had been no publicity concerning the defendant (App. 56). However, the Court's contention that this time span was an important factor in finding no prejudice is not in accord with the testimony of the jurors. Each of the jurors questioned had excellent recollection of all the events surrounding Murphy's past criminal exploits and also of the various legal conflicts which occured during the pretrial proceedings in this case.

In the present case, the motion for change of venue which was filed with the state trial court did not evolve around the sole fact that the news media published accounts of the case. The factual matters which established the necessity for change of venue were:

1. The news media's earlier attack on the trial court judge for reducing the Defendant's bond in the first case which was filed, tc wit: Case Number 68-530. (R. 26).

2. The news media's earlier prejudicial reporting concerning the state trial court's ruling declaring the defendant incompetent in Case Number 68-530. There was such a public outcry over said ruling that several highly publicized investigations were conducted at both the state and county level. (R. 92-97).

3. The news media's continued reporting of Defendant's past criminal life and convictions.

4. The trial court's complete failure to make any attempt to control the publicity so as not to prejudice

the defendant. In fact, the trial court sought publicity because the judge was running for re-election. This is evident by the fact that the trial judge continued or transferred all of his other cases with the exception of defendant's case and that of the also highly publicized Charles Celona case. In fact, the judge was trying both cases at the same time, devoting the mornings to defendant's trial and the afternoons to the Celona trial.

The fact that the trial court took no steps to control publicity was readily shown by the court's earlier order of July 8, 1969, concerning the trial of the two co-defendants in the within cause (App. 32). The state trial court citing *Sheppard v. Maxwell, supra,* admitted that he had failed to control publicity which had saturated the community, and therefore changed the venue for those two co-defendants. Furthermore, at no time either prior to or during the jury selection, did the trial court take any steps whatsoever to control what the jurors read, said or did concerning Jack Roland Murphy.

In *Sheppard v. Maxwell,* 384 U.S. at 362-363, the Court discussed the protection which must be afforded to a defendant in a criminal case.

> . . . due process requires that the accused receive a trial by an impartial jury free from outside influence. Given the pervasiveness of modern communications and the difficulty of affecting prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused. . . . where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates or transfer it to another county, not so permeated with publicity. . . . (citation omitted).

Above and beyond, the trial court's failure to take steps to protect the defendant, is the actual knowledge of each of the individual jurors involved. The Statement of the Case in this brief as well as the record now before this Court clearly establishes each jurors' familiarity with the defendant, notwithstanding the fact that a substantial portion of the publicity surrounding the petitioner had occurred months prior to the actual trial of the within cause. In *United States, ex rel. Bloeth v. Denno,* 313 F.2d 364 (2nd Cir. 1963), the Court in a case similar to the case at bar held:

> "We have examined the record, including *voir dire* examination of the jurors challenged or excused, which was not before Judge Cashin. His conclusion that lack of impartiality of the trial jury had not been established appears to us clearly erroneous. Jury impartiality must be measured by the standards established by the Supreme Court in the line of cases culminating in *Irvin v. Dowd* . . . . Applying these rules to the facts of that case, however, it was made plain that merely going through and obtaining the jurors' assurances of impartiality is insufficient. The reviewing court must determine from a review of the entire *voir dire* whether the extent and nature of the publicity had caused such a build up of prejudice that excluding the preconception of guilt from the deliberations would be too difficult for the jury to be honestly found impartial."

As shown from the breakdown of the jurors' statements (App. 60-186) the jury had sufficient knowledge of this case, including the controversial ruling concerning bond and the defendant's sanity, as well as defendant's past criminal background so as to permit an assumption that potential substantial prejudice was evident from these facts. *United States v. Wade,* 388

U.S. 218, 227; *Dicky v. Florida,* 398 U.S. 55 (concurring Opinion of Justice Brennan). The comments of one particular juror amply sets forth the demeanor and thoughts of the jury panel. (See footnote 1, page 6 of the brief).

Comments such as this as well as the examination of all the jurors clearly reflect that the possibility of obtaining a fair and impartial jury in light of all of the publicity surrounding Murphy, as well as each juror's knowledge of Murphy's past criminal convictions was practically non-existent notwithstanding assurances of impartiality.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of Court below be reversed, that the Court order the conviction of Defendant be vacated and that the cause be remanded back to the state trial court for a new trial.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-5116

JACK ROLAND MURPHY,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Petitioner's direct appeal following conviction was to the District Court of Florida, Third District. The opinion of that court is reported at 252 So.2d 385 (Fla. 3rd DCA, 1971).

Petitioner's petition for the writ of habeas corpus was denied by the United States District Court for the Southern District of Florida. The opinion is reported at 363 F.Supp. 1224 (S.D. Fla., 1973).

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 495 F.2d 353 (5th Cir., 1974).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on June 10, 1974. (App. 51.) The petition for a rehearing by the Court en banc was denied July 12, 1974. (App. 59.)

The Petition for a Writ of Certiorari and Motion to Proceed in Forma Pauperis were docketed August 12, 1974, and granted December 23, 1974. Petitioner's brief in final form was filed February 19, 1975.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

WHETHER THE PETITIONER WAS DENIED A FUNDAMENTALLY FAIR TRIAL AS PRESCRIBED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT FAILED TO DISMISS FOR CAUSE THOSE JURORS WHO KNEW THAT PETITIONER WAS A CONVICTED FELON?

II

WHETHER THE PETITIONER WAS DENIED A FUNDAMENTALLY FAIR TRIAL AS PRESCRIBED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT DENIED HIS MOTION FOR CHANGE OF VENUE BASED UPON ALLEGEDLY PREJUDICIAL PRETRIAL PUBLICITY?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

Article I, Section 16 of the Constitution of the State of Florida provides in pertinent part as follows:

> SECTION 16. Rights of accused.-- In all criminal prosecutions the accused shall. . .have a speedy and public trial by impartial jury in the county where the crime was committed.

STATEMENT

The petitioner in this Court was the defendant in the trial court. The respondent, the State of Florida, was the prosecution. On petition for the writ of habeas corpus the defendant was the petitioner and the State of Florida the respondent. For purposes of clarity, the parties respectively will be referred to as petitioner and respondent.

On January 28, 1968, the home of a Miami Beach resident, Olive Wofford, was robbed. The petitioner, Jack Murphy, was apprehended as he and three others fled from the scene.

His arrest drew a flurry of attention from the press as the petitioner had previously drawn national attention upon himself as one of the perpetrators of the theft of the "Star of India" sapphire from the New York Museum of Natural History in 1964. However, in May of 1968, before he could be brought to trial for the Wofford robbery, petitioner was arrested and indicted in neighboring Broward County on two charges of murder, popularly known as the "Whiskey Creek Murders". On March 1, 1969, petitioner was found guilty of one of these murders.

In the interim, the Wofford charges had been nolle prossed after petitioner had been ruled incompetent to stand trial and Broward County prosecutors desired to commence the murder trial in that county. On August 14, 1968, petitioner was indicted by a Jederal grand jury for conspiring to

transport stolen securities in interstate commerce. He pleaded guilty to one count of this indictment in December.

Thereafter, the Dade County prosecutors refiled the Wofford robbery charges. In July of 1970, pretrial proceedings were begun. Petitioner moved for a change of venue based upon allegedly prejudicial pretrial publicity. The trial court did not rule on this motion at that time but deferred ruling until after the voir dire of the jury panel. Seventy-eight jurors were questioned. Of these, twenty were excused peremptorily, twelve by the petitioner and eight by the prosecution. Twenty-seven were excused for medical, family, or economic reasons. Twenty veniremen were excused because they had formed an opinion that the petitioner was guilty and could not give him a fair trial. Three were excused for miscellaneous reasons. The resulting jury consisted of six regular jurors and two alternates. Thereafter the motion for change of venue was argued before the court, and was denied. Prior to trial the court also conducted a competency hearing on the defendant's plea of insanity, resulting in the ruling that he was competent to stand trial.

At trial the petitioner did not take the stand in his own behalf and offered no evidence. Moreover, he declined to cross-examine any of the prosecution's witnesses announcing after direct examination of each witness that the defendant did not accept the jury panel and declined to question the witness.

The petitioner was found to be guilty by the jury of breaking and entering a dwelling with intent to commit robbery being then and there armed and/or assaulting persons therein. He was also found guilty of assault with the intent to commit robbery. He was adjudicated guilty by the court on both counts and sentenced to serve a term of life imprisonment for the crime of breaking and entering and to serve a consecutive term of twenty years for the crime of assault.

Petitioner's objections to his trial jury and to the venue in which trial was held were raised on direct appeal in the state courts and in his petition for the writ of habeas corpus in the appropriate federal district court. On appeal therefrom to the United States Court of Appeals for the Fifth Circuit it was held that neither the failure to grant petitioner's motion for change of venue predicated on pretrial publicity, nor the denial of challenges for cause of those jurors who knew petitioner was a convicted felon, constituted error of constitutional proportions and therefore presented no grounds for the issuance of a writ of habeas corpus.

SUMMARY OF THE ARGUMENT

A. The petitioner was not subject to the impairment of any rights guaranteed by the Constitution of the United States during the course of his Florida prosecution. The findings of the two federal habeas corpus courts below are amply supported by the record in this regard. Years before, starting with the

nationally publicized "Star of India" jewel theft, the petitioner had begun to call attention to himself through his criminal exploits. As a result his Florida prosecutions, both state and federal, in 1968 and 1969 for a variety of crimes attracted widespread news media attention prior to the trial of the instant case. Nevertheless, it is crucial to proper disposition of petitioner's claims that this publicity was factual rather than inflammatory, discussed matters of public record, and was declining in intensity prior to trial of the case at bar.

Petitioner contends the trial judge violated his due process rights in failing to excuse for cause those jurors who from the above publicity had learned of petitioner's felony convictions, relying upon Marshall v. United States, 360 U.S. 310 (1959) and United States ex rel. Doggett v. Yeager, 472 F.2d 229 (3rd Cir. 1973). Marshall is not precedent here. Decided solely as an aspect of this Court's supervisory power, it comes not even close to suggesting due process violations. Lower courts other than the Doggett court have viewed Marshall as properly applied only to federal trials. In state prosecutions the totality of the circumstances test of Irvin v. Dowd, 366 U.S. 717 (1961) sets the proper standard. The Third Circuit itself has subsequently declined to follow Doggett and Marshall in a later case where publicity was neither inherently inflammatory nor the circumstances of the case egregiously prejudicial. United States v. D'Andrea, 495 F.2d 1170 (1974). In such cases the declarations of the jurors as to their impartiality must be dispositive unless petitioner surmounts the burden of showing actual prejudice to him from trial before the jury.

B. For Corresponding reasons the petitioner was not denied due process when the trial court denied his motion for change of venue. Such change is not to be reflexively granted upon a showing of widespread pretrial publicity, but again requires a certain burden be borne by the defendant. It must be shown that the publicity is inflammatory and likely to arouse the community's passion against the accused. The petitioner here has fallen far short of that test. This is especially true in light of the jurors' own protestations of impartiality on an intensive in-camera voir dire, supported by a record demonstrating the factual nature of said publicity. It has been held sufficient by this Court that the jurors can lay aside impressions or opinions and render a verdict based on the evidence presented in Court. Irvin v. Dowd, supra. The trial court was eminently correct in deferring ruling on the change of venue motion until after voir dire, which conclusively demonstrated that such change was unnecessary. Additionally, the distinction is between cases in which the nature of the attention by, and conduct of, the press involve such a probability of prejudice that no nexus need be shown between community prejudice and jury prejudice, and cases in which news coverage is neither accusatory nor vindictive. In the latter class of cases no bitterness or prejudice is created in the community and the accused must demonstrate a necessity for change of venue on voir dire examination. If the pretrial

publicity were intensive or extensive or the examination of the entire panel revealed widespread prejudice against the defendant, the Court could, as a matter of law, disregard the jurors' estimation of themselves. Beck v. Washington, 369 U.S. 541 (1962). In the instant case, it could not. Finally, where proof of the crime is overwhelming, any doubt as to the validity of the trial court's ruling must be governed by the test of harmless error.

ARGUMENT

I

THE PETITIONER WAS NOT DENIED A FUNDAMENTALLY FAIR TRIAL AS PRESCRIBED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT FAILED TO DISMISS FOR CAUSE THOSE JURORS WHO KNEW THAT PETITIONER WAS A CONVICTED FELON.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees a criminal defendant, accused by one of the States, the right to a fundamentally fair trial by a panel of impartial, indifferent jurors. Irvin v. Dowd, 366 U.S. 717 (1961). The Florida Constitution provides the essential protection that "In all criminal prosecutions the accused shall . . .have a speedy and public trial by impartial jury in the county where the crime was committed." Constitution of the State of Florida, Article I, Section 16 (1968). Florida's application of this State constitutional standard governs unless in construction thereof Fourteenth Amendment Due Process has not been satisfied. Pamplin v. Mason, 364 F.2d 1, 3 (5th Cir. 1966).

A. Review Of A Petition For the Writ Of Habeas Corpus Is Governed Not By The Broad Exercise Of Supervisory Power But The Narrow One Of Due Process.

In challenging the validity of the conviction by virtue of which he is incarcerated, the petitioner bears a double burden of proof: first, that the alleged error was of constitutional magnitude, 28 U.S.C § 2254(a); Milton v. Wainwright, 407 U.S. 371, 377 (1972), and in addition that the alleged error contributed to the verdict of guilt. Peters v. Kiff, 407 U.S. 505, 508 (1972), dissenting opinion of Mr. Chief Justice Burger. Moreover, where the issue raised on habeas corpus is resolved with findings of fact in the state courts, the state court's determination made on the merits of the factual issue is presumptively correct. 28 U.S.C. § 2254(d), (d)(1). The burden is then the petitioner's to establish "by convincing evidence that the factual determination by the State court was erroneous." LaValle v. Delle Rose, 410 U.S. 690 (1973). The findings in the case at bar bear particular mention. The District Court of Appeal of Florida, Third District, is the court of direct review for Dade County's criminal trial courts.[1] On September 21, 1971, that court held, among other points, that the trial judge did not abuse his discretion in failing to grant a change of venue or in refusing to excuse for cause each member of the jury panel. Murphy v. State, 252 So.2d 385 (Fla. 3rd DCA, 1971).

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[1]Constitution of the State of Florida, Article V, Section 4.

The motion for change of venue, and in part the challenge of jurors for cause, was based upon exhibits of news media reports attached to the motion for change of venue. With reference to both these questions the court ruled adversely to the petitioner because it found that the news media publicity, of which the defendant complained, consisted for the most part of factual accounts. It further found that there was no demonstration "or argument" that the reports were highly colored or inflammatory. That finding was confirmed by both federal courts below. Murphy v. State, 363 F.Supp. 1224 (S.D. Fla., 1973), affd. 495 F.2d 553 (5th Cir., 1974).

Petitioner contends the jury's exposure to publicity making reference to his prior criminal convictions was in itself adequate cause for challenge regardless of the nature of the publicity or the juror's own assurances of impartiality.[2] In support thereof he relies upon Marshall v. United States, 360 U.S. 310 (1959). Nevertheless, Marshall is of doubtful precedential value in the case of a state defendant petitioning for federal habeas corpus.

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[2]The right of accurate publication of public prosecutions and other matters of public record, such as convictions, cannot be abridged. See Cox Broadcasting Corp. v. Cohn, __ U.S. __ No. 73-938 (decided March 3, 1975). Once such right is exercised by the press the question is whether the trial court has taken such measures as will guarantee the defendant due process.

Decided solely as an aspect of this Court's supervisory power over federal criminal prosecutions, the case was not decided on constitutional grounds; it therefore presents no standard for review of state cases. Moreover, the overwhelming majority of courts to consider the "Marshall issue" have held that it does not rise to a constitutional level.

As stated by the court below, ". . .the situation in Marshall is factually similar to the instant case. . ." Marshall was tried and convicted for unlawfully dispensing a drug controlled by federal law. During the trial two newspapers were seen by members of the jury stating that Marshall's wife had been convicted on "drug charges" and that the defendant himself had a record of prior felony convictions.

The trial judge, upon discovery of the foregoing, inquired of the jurors individually. Each of the jurors told the judge that he would not be influenced by the news articles, that he could decide the case only on the evidence presented, and that he felt no prejudice against the defendant as a result of the news articles. The trial judge denied defendant's motion for mistrial, and the Court of Appeals affirmed. This Court reversed.

Nevertheless, Marshall makes difficult precedent for the instant case. The first blush resemblance between the cases must nevertheless be tempered by their basic differences. First, petitioner Murphy complains of publicity, as evidenced by

the news clippings and television releases of record, occurring a substantial lenght of time prior to trial. This Court's decision in Marshall involved newspaper articles published during the trial itself. It is submitted that there is an inherent difference between news media material concerning the trial and reaching the jurors then in the process of receiving the evidence of that very trial, and pre-trial publicity covering a time span between a year and a half and three and a half years prior to trial.

Secondly, petitioner here seeks a writ of habeas corpus, available to him only upon a showing of constitutional error, while this Court's position in Marshall was carefully drawn solely in the exercise of its supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts. With the exception of the intimations of the United States Court of Appeals for the Third Circuit in United States ex rel. Dogget v. Yeager, 472 F.2d 329 (1973), no court has viewed the effects of Marshall as extending beyond the federal trial courts.

In Pacheco v. Hocker, 295 F.Supp. 829 (D. Nev. 1968), aff'd 406 F.2d 1031 (5th Cir. 1969) cert. den. 396 U.S. 1043 (1970). Pacheco, a state prisoner, petitioned for a writ of habeas corpus alleging, inter alia that he did not receive a fair trial as guaranteed by the due process clause of the Fourteenth Amendment in that some of the jurors admitted reading newspaper articles during

the trial concerning his codefendant's plea of guilty to similar charges and the defendant's own former convictions for two felonies. On voir dire of the jurors by the court five jurors and one alternate admitted having read the article, although each replied in the affirmative to the court's questioning as to whether they could still give the defendant a fair and impartial trial and set aside anything contained in the article. Defendant's motions for mistrial were denied and Pacheco's subsequent conviction was affirmed on appeal to the highest court of that state, one judge dissenting.

In due course the state prisoner then exercised his right to review his custody for constitutional infirmity by petitioning for a writ of habeas corpus in the appropriate federal district court, raising the same questions as does Petitioner Murphy. The District Court phrased the issues as follows:

> We are faced with an ever-recurring problem which, for us, is posed by the following questions:
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> Are prejudicial error and lack of Fourteenth Amendment due process, in the context of the Sixth Amendment right to a fair trial, synonymous? If a Federal Judge, sitting on the Supreme Court of Nevada, would have joined in the dissenting opinion rather than the majority opinion of that

> Court on direct review of the conviction, should that Judge ipse dixit declare a violation of federal constitutional rights on a petition for habeas corpus? Are principles announced by the Supreme Court of the United States, in exercise of its supervisory power over federal court trials (Cf. Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250), conclusive in application of the due process--fair trial requirements to the state courts? The proper answer to each of these questions is "No." Hilliard v. Arizona, 9th Cir. 1066, 362 F.2d 908; Wolfe v. Nash, 8th Cir. 1963, 313 F.2d 393.
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> Id. at 832.

That court, relying on the same factors controlling the instant case, held that even the most sensitive jurist could find no denial of due process in the refusal of a new trial. Those factors were: 1) Each juror who read the offending newspaper articles on examination by the court and defense counsel affirmed his ability to set the information aside and accord the defendant a fair trial. 2) The jurors affirmations were accompanied by such indicia of reliability as their individual statements such as, "As I see it we are trying him for one thing and it has nothing to do with anything else," and "certainly, that had nothing to do with what he is being tried for."

3) The evidence adduced overwhelmingly established the defendant's guilt. The very same factors formed the basis for denying the instant petitioner relief in those lower courts which have reviewed the cause sub judice and have consistently found petitioner's contentions wanting in merit.

This judicial confinement of Marshall v. United States, supra, to cases tried in the federal trial courts is the nearly universal view of both federal and state courts[3] which have rendered opinions on the present issue. Habeas corpus review of state criminal

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[3]The state criminal courts have refused to unseat jurors solely because they possessed some knowledge of the accused which would have been inadmissible as evidence at trial. Instead they have reviewed the totality of the circumstances, most frequently being guided by this Court's treatment of the issue in Irvin v. Dowd. State v. Collins, 150 N.W.2d 850 (Minn., 1967); Peters v. Commonwealth, 505 S.W.2d 764 (Ky. App., 1974); State v. Heard, 268 So.2d 629 (La., 1972); State v. Jarrette, 202 S.E.2d 721 (N.C., 1974); State v. Beason, 506 P.2d 1340, 1348 (Idaho, 1973); Greenfield v. Commonwealth, 204 S.Ed.2d 419, 420 (Va., 1974); Mathis v. State, 296 So.2d 764, 766 (Ala., 1974); Smith v. State, 327 S.W.2d 308 (Tenn., 1959); People v. Frogge, 75 Cal.Rptr. 517 (5th DCA, 1969); Commonwealth v. Pierce, 303 A.2d 209 (Pa., 1973); Reil v. Commonwealth, 171 S.E.2d 162 (Va., 1969); State v.Odum, 369 S.W.2d 173, 181 (1963).

trials is not limited merely to the single question of whether jurors learned of the defendant's otherwise inadmissible criminal history, but entails a review of the totality of the trial, each case being decided on its own facts. Irvin v. Dowd, 366 U.S. 717, 728 (1961). Thus, in United States v. Smith, 306 F.2d 596 (2d Cir., 1962), the Court of Appeals reversed the grant of habeas corpus relief to a state prisoner, holding the standard imposed by Marshall to be more stringent than the due process requirement that the defendant be afforded a fair trial by a panel of indifferent jurors.

> . . .if this had been a federal trial and jurors had admitted to reading contemporaneous reports of a defendant's criminal record, our supervisory power over the administration of federal justice would compel us to reverse. Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed. 2d 1250 (1959). But the mere possibility that such information, made public three months prior to trial, might have remained in the minds of one or more of those who eventually became jurors in the case is not in itself sufficient to raise a constitutional infirmity in Brown's conviction under the due process clause of the Fourteenth Amendment.
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> Id. at 603.

B. The Instant Case Lacks Circumstances So Egregious That The May Be Deemed Inherently Prejudicial. This Case Must Be Governed By the General Rule That The Burden Of Demonstrating Prejudice Is On The Challenger.

Petitioner's challenge is in essence, the question of whether the trial court's handling of jury selection rendered Murphy's "trial so unfair as to amount to a taking of" his "liberty without due process of law." Fay v. New York, 332 U.S. 261, 296 (1947). The majority of the Court in Fay was careful to point out, in developing this issue, that while the Supreme Court of the United States has a supervisory power over federal judicial proceedings, there is a "duty of deference to the authority of the State over local administration of justice." See United States ex rel. Darcy v. Handy, 224 F.2d 504 (3rd Cir., 1955) affd. 351 U.S. 454 (1956). The necessary corollary of this doctrine is that a habeas corpus petitioner, as in most forms of collateral attack, must assume and sustain the burden of proving some identifiable prejudice in order to show that his jury was prejudiced. Stroble v. California, 343 U.S. 181 (1952); Beck v. Washington, supra; Irvin v. Dowd, supra. As stated by this Court in Irvin:

> In these days of swift, widespread and diverse methods of communication an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. * * *To hold that the mere exertence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. At p. 722-723, at p. 1642 of 81 S.Ct.

Following the dictates of this Court in Irvin v. Dowd, lower federal courts have refused writs of habeas corpus where petitioners have been able to demonstrate at most the possibility of prejudice. Mares v. United States, 383 F.2d 811 (10th Cir. 1967); Latham v. Crouse, 330 F.2d 865, 868 (10th Cir., 1956), cert. den. 379 U.S. 866 (1964). Most frequently, the controlling consideration has been a voir dire of the jurors which satisfies the Irvin v. Dowd requirements. Mares, supra.

In United States ex rel. Parson v. Anderson, 354 F.Supp. 1060 (D. Del. 1972), affd 481 F.2d 94 (3rd Cir. 1973), a state prisoner challenged the fairness of his trial on allegations similar to those presented here. Parson was brought to trial for the crime of murder in the course of attempting to perpetrate rape. As in the present case, the task of jury selection was a considerable one. It consumed nine and one half trial days, and some 1,582 pages of transcript. Fifty-four veniremen were excused for reasons apart from community prejudice related matters. One hundred twenty-eight were discharged for cause as a result of their having formed opinions as to the defendant's guilt. By way of comparison to the instant case, jury selection lasted fifteen days, also requiring approximately 1500 transcribed pages to report, although only seventy-eight jurors were called. Of those thirty were excused by the court for unrelated reasons and only twenty were excused because they might have formed an opinion as to the defendant's guilt. (The remaining jurors were peremptorily excused, leaving a jury of six and two alternates.)

Parson contended he was denied his constitutional right to an impartial jury. Admitting that the court was confronted with a difficult task, it recognized that this was ". . .one of those situations where the Supreme Court has recognized it is impossible to find jurors 'totally ignorant of the facts and issues involved'" citing to Irvin v. Dowd, supra, at 722. In ultimately ruling the court, however, was careful to focus on the jurymen seated as opposed to the one hundred

ninety-seven who were questioned. See Gordon v. United States, 438 F.2d 858 (5th Cir. 1971), analyzing those cases in which reversal of convictions without a showing of jury prejudice is confined to "extreme cases" of "inherently prejudicial publicity" which "saturated the community." For cases failing to qualify as such, the Fifth Circuit stated ". . .we are in accord with the view that where publicity prior to and during a trial is neither inherently prejudicial nor unusually extensive, the accused must assume the traditional burden and show actual jury prejudice." (Footnotes omitted.)

C. The Petitioner Was Not Denied A Fundamentally Fair Trial Because Some Member Of His Jury Had Knowledge Of His Prior Criminal Violations.

It is not a per se constitutional infringement for the jury to know of a defendant's prior crimes. Spencer v. Texas, 385 U.S. 554, 560 (1967). Conversely, not every trial error or infirmity which might call for the application of supervisory power also constitutes a "failure to observe that fundamental fairness essential to the very concept of justice." Donnelly v. DeChristoforo, __ U.S. __, 94 S.Ct. 1868, 1871 (1974), quoting Lisenba v. California, 314 U.S. 219, 236 (1941). The fundamental and historic distinc-

tion between standards required by due process of law and those established by this Court in the exercise of supervisory power was discussed at greater length in McNabb v. United States, 318 U.S. 332, 340-341 (1943):

> In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us. For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice", Hebert v. Louisiana, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270, 48 A.L.R. 1102, which are secured by the Fourteenth Amendment, the scope of court reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further

> its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accomodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts.

See Rideau v. Louisiana, supra, Mr. Justice Clark dissenting 373 U.S. at 729. Marshall v. United States must be so viewed in its relation to the case sub judice.

Marshall has not been construed by the federal courts to extend beyond its expressly stated scope of supervisory power over the federal trial courts. Petitioner contends the United States Court of Appeals for the Third Circuit has now so held in United States ex rel. Doggett v. Yeager, 472 F.2d 229 (1973) and that circuit's reading of developing case law. In Doggett the defendant, accused of bank robbery, was tried in a small, rural community amid considerable newspaper publicity. The publicity concerned Dogget's alleged pretrial escape attempt and his change of plea from one of "guilty" to one of "not guilty". Thus, and it is important to note, the publicity concerned two independent circumstances which the jury could construe as

an admission of guilt of the very crime charged. The trial court questioned the jury en banc with the intent of determining prejudice from the articles. Four had heard about or read one of the articles during the trial. Nevertheless the judge rejected a joint suggestion by defense and prosecution that he inquire of the jurors whether there had been any discussion among themselves about one particular article. The court had earlier admonished the jury not to read anything about the case, and the order was apparently disregarded. Similarly, the judge refused to question the jurors later during the trial when defense counsel again reported to the court that the jury may have been exposed to another prejudicial newspaper article. In addition, and in sharp contrast to the instant case, the evidence of guilt was far from "overwhelming". The defendant was not apprehended near the scene, spatially or temporally; moreover, the loot was not recovered. Thus, the court was compelled to state 'We cannot hold that information about an escape attempt could not have influenced the verdict certainly we cannot so hold beyond a reasonable doubt. (Citations omitted.) 472 F.2d at 236. On the foregoing facts the Third Circuit held that the substantial likelihood of the newspaper articles, concerning the attempted escape and the retracted guilty plea, coming before the jury was sufficient in itself without requiring the defendant additionally to show actual prejudice from the publicity. The court codified its view of the case law as resulting in the rules that 1) if the defendant has shown the likelihood that seriously prejudicial materials may have reached the jury, due

process requires some form of relief, and 2) that a juror's statement that the adverse publicity will not influence him does not automatically qualify him as impartial. 472 F.2d at 239.

As a result, the petitioner seeks to impose the absolute rule that the suggestion of prejudice is by itself sufficient to warrant a new trial without the defendant having to show actual prejudice. That the Doggett holding may have been more a result of its own particular facts, than it was an announcement of a clear rule by that circuit is evident from that very same court's opinion in United States v. D'Andrea, 495 F.2d 1170 (1974). There, in affirming the trial court's denial of a mistrial based on the jury's exposure to a newspaper article reporting the defendant's indictment on another charge, and referring to the defendant as a "gang figure" and a "reputed underworld figure" the court relied heavily on the juror's own assurances, the trial judge's instructions, and the same analysis of this Court's prior opinions as is submitted by respondent in this brief.

> In some cases, the publicity that occurs is so fundamentally prejudicial that actual prejudice is presumed as a matter of law. In these cases, the mere occurrence of the event requires declaration of a mistrial. See, e.g., Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965) (two key prosecution witnesses acting as attendants for the jurors throughout the trial) Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 633 (1963) (motion picture of defendant "confessing" to the sheriff shown on local television).

Where the improper publicity is of less serious nature however, no similar presumption operates. In these cases, the appellate court (like the district court) must review the circumstances surrounding the exposure of the jury to the publicity and order a new trial only when substantial prejudice has occurred. See United States ex rel. Doggett v. Yeager, 472 F.2d 229, 239 (3d Cir. 1973); Marshall v. United States, 360 U.S. 310, 312, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959). A comparison of the facts of this case to the facts of Turner, Rideau, and the cases which follow their approach make it clear that this case falls in this latter category; that is, substantial prejudice must be shown.

495 F.2d 1170 at 1172 fn. 5

II

THE PETITIONER WAS NOT DENIED A FUNDAMENTALLY FAIR TRIAL AS PRESCRIBED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT DENIED HIS MOTION FOR CHANGE OF VENUE BASED UPON ALLEGEDLY PREJUDICIAL PRETRIAL PUBLICITY.

A. The Burden Of Proof Rests With Petitioner To Show Facts Upon Which Prejudice Can Be Demonstrated.

In order for a defendant to be successful in his attempt to change venue, it is necessary for him to show that because of the pretrial publicity, there is such a feeling of prejudice and bias against him in the community where he is to be tried that his right to obtain a fair and impartial trial is jeopardized.

In considering the defendant's motion for a change of venue based on pretrial publicity the court must not be "concerned with the fact of publicity but with the assessment of its nature." Silverthorne v. United States, 400 F.2d 627, 631 (9th Cir. 1968) cert. den. 400 U.S. 1022 (1971). The existence of widespread publicity does not by itself support a change of venue. Beck v. Washington, 369 U.S. 541 (1962). The publicity must be inflammatory and likely to arouse the community's passion against the particular defendant. Sheppard v. Maxwell, 384 U.S. 33 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 717 (1963); Irvin v. Dowd, 366 U.S. 717 (1961) (hereinafter sometimes referred to as Sheppard, Estes, Rideau and Irvin). The respondent respectfully submits that the publicity surrounding petitioner's trial, in the instant case, does not meet this standard. The in-camera voir dire which encompassed close to 1500 pages of the record on appeal demonstrates a successful

attempt in eliminating veniremen who might possibly have been contaminated against the petitioner by the pretrial publicity.[4] However, petitioner asserts that notwithstanding the jurors' assurances of fairness, their knowledge of petitioner's previous convictions and their exposure to publicity necessarily belies their candid expressions of impartiality. (Brief of Petitioner at 16, 21.) Such an assertion finds no support in previous decisions of this court. It is only when the publicity is virulent Rideau, or consistently states that the defendant is guilty, Irvin, or creates a carnival atmosphere Sheppard, that it would be possible to assume that veniremen might be unable to respond candidly to the voir dire

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[4]The term "pretrial" publicity will be used throughout the brief. It should be noted, however, that this phrase is to be interpreted in light of the following facts: The dates on the great majority of newspaper clippings, offered by petitioner, show them to have been published between December 15, 1967 and January 24, 1969. Jury selection in the case at bar began July 27, 1970, more than one and a half years after the "widespread" publicity. This crucial factor will be developed further in the brief.

interrogation.[5] The seven federal and state judges who have had occassion to review the record have all affirmed the trial court's implicit determination that neither bitter feelings of virulence nor a carnival atmosphere existed in Dade County.[6] The law is well-established that "[t]he finding of the trial court upon that opinion ought not be set aside by a reviewing court, unless the error is manifest." Reynolds v. United States, 98 U.S. 145, 156 (1878).

To prevail, petitioner assumes a double presumption--that the publicity surrounding the instant case was prejudicial rather than factual and that the six (6) jurors on his jury had read or seen these accounts and were thereby influenced in their deliberations. The burden of proof thus falls

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[5]In its examination of the record the District Court found that "[a]fter careful consideration of the record, the Court concludes that no widespread prejudice against petitioner was harbored by the jury panel. Furthermore, the publicity of which petitioner complains was, as the State appellate court found, largely factual, rather than inflammatory in nature." Murphy v. Florida, 363 F.Supp. 1224, 1228 (S.D. Fla. 1973) aff'd 495 F.2d 553 (5th Cir. 1974).

[6]Murphy v. State, 252 So.2d 385 (Fla. App. 1971); Murphy v. Florida, 363 F.Supp. 1224 (S.D. Fla. 1973) (App. 40) aff'd 495 F.2d 553 (5th Cir. 1974) (App. 51).

squarely upon the shoulders of petitioner to show that his conviction was a result of "essential unfairness. . .not as a matter of speculation but as a demonstrable reality." Adams v. United States ex rel. McCann, 317 U.S. 269, 281 (1942). Under the following factual analysis, respondent submits petitioner has manifestly failed to meet this standard.

B. The Petitioner's Conviction Must Stand Unless Prejudice Is Shown By Expressions On The Part Of The Overwhelming Majority Of The Persons Questioned On Voir Dire, As Well As By A Substantial Proportion Of The Jurors Actually Empaneled.

The evolution of mass communication, from the handbills of the 1700's to the telecommunication satellites of today has been paralleled by a line of cases from this Court emphasizing the procedural and substantive safeguards necessary to assure fair criminal trials before impartial jurors.

In 1807 the treason trial of former Vice President of the United States, Aaron Burr, set the stage for the first judicial discussion of a criminal defendant's constitutional right to be tried by an impartial jury. Chief Justice John Marshall, presiding at the trial, ruled that the Constitution demanded that a criminal jury must be free "from those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them." Burr's Trial, 8 U.S. (4 Cranch) 455 (1807) and that the verdict must be based solely upon the evidence presented in court. The Chief Justice, however, distinguished "deep impressions " from "light

impressions" and held that the latter may be presumed capable of yielding to evidence, and therefore, not capable of rendering the jury partial.

In 1878 Reynolds v. United States, presented the "partial juror" problem to this Court for the first time on appeal. Expanding Mr. Justice Marshall's distinction between "deep" and "light" impressions, Reynolds held that a partial juror is not necessarily one who has formed an opinion, since it is virtually impossible to find one who has not heard or read of a notable crime, but rather the defendant must show "the actual existence of such an opinion in the mind of a juror as will raise the presumption of partiality." Reynolds v. United States, supra at 157. The question of how an appellate court was to determine this partiality left the important questions unanswered.

Although Justice Jackson, joined by Justice Frankfurter, had concurred in the reversal of the convictions on "trial by newspaper" grounds in Shepherd v. Florida, 341 U.S. 50 (1951) and Justice Frankfurter had dissented on the same grounds in Stroble v. California, 343 U.S. 181 (1952), Irvin v. Dowd, 366 U.S. 717 (1961), marked the first time this Court struck down a state conviction solely on the ground of prejudicial publicity. This Court, in Irvin clarified the extent of impartiality required under the Fourteenth Amendment Due Process Clause. It would appear from the holding in Irvin v. Dowd, supra, that in addition to extreme and intense adverse publicity, deep seated and bitter prejudice must be shown from the tes-

timony taken on voir dire on the part of the jurors actually selected in order to convince the reviewing court that a reversal of the conviction is necessary under the Fourteenth Amendment. While it is true that "a juror who has formed an opinion cannot be impartial" Reynolds v. United States, 98 U.S. 145 (1898), this Court made it clear that jurors need not be "totally ignorant of the facts and issues involved" and may "have formed some impression or opinion as to the merits of the case. . .particularly. . .in criminal cases." Irvin v. Dowd, 366 U.S. 717, 722 (1961). Taking cognizance of "swift, widespread, and diverse methods of [modern] communication" and of the interest which an important criminal case is sure to arouse the Court said:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective jurors impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in Court.
>
> Irvin v. Dowd at 723

The State is aware that the adopting of such a rule does not "foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law." Lisenba v. People of California, 314 U.S. 219, 236 (1941).

In making this inquiry, however, the proper focus should be directed toward the six jurors who decided petitioner's fate. "While this does not mean that the experience of the court with the other veniremen questioned is wholly irrelevant, it does mean that the significance of that experience is primarily as a context in which to evaluate the examinations of, and the court's rulings on", those "who in fact served. See e.g., Irvin v. Dowd, 366 U.S. 717 (1961)." United States ex rel. Parson v. Anderson, 354 F.Supp. 1060, 1079 (D. Del. 1972). The following summary of the juror examination, in the instant case, will confirm juror impartiality and the absence of constitutional infirmity. See Beck v. Washington, 369 U.S. 541, 556 (1962).

> Mrs. Patricia Esher: She had heard of the crime, but "skipped over" reading the newspaper accounts; she felt she could give petitioner a fair trial. (TR. 480) In the jury room she had heard remarks both that petitioner was guilty and that he was innocent. Her word association with appellant's name was only that he worked on the beach and was a surfer. (TR. 492) Appellant's prior convictions (TR. 504), or failure to take the stand (TR. 501) would not alter her requirement of proof of the crime charged. (TR. 501) She adhered to the requirement of constitutional protections. (TR. 522) The following excerpt from

Mrs. Esher's voir dire best illustrates the degree to which she could be fair and impartial:

Q. [by defense counsel] Would the fact that he was a convicted murderer, or the fact that he was a convicted jewel thief tend to influence your verdict.

A. I would think so and I will tell you why. Because as the mother of three boys, once somebody has become involved in something, it is a very natural thing for people thereafter to immediately pick up one who has already been involved in something.

Q. I don't understand your analogy, ma'am.

A. A child who has been in trouble, everything that comes down the wire, immediately out of that, people single him out.

Q. Now, would the fact that he had been convicted tend to influence your verdict?

A. Not in this case.

Q. Not at all.

A. No.

(TR. 503-504)

James Collins: This juror stated he had not read anything that would prevent giving appellant a fair trial (TR. 618), and would presume him innocent (TR. 617). He vaguely remembered newspaper accounts several years before concerning the Whiskey Creek and Star of India ases. (TR. 624) In conversation on his job and in the jury room he learned of appellant's prior conviction for murder. (TR. 625) He stated none of those then in the jury room had formed an opinion of guilt on the present charge. (TR. 625-626) He did not own a television (TR. 626), had purposely avoided trying to read about the case (TR. 632) and did not believe in guilt by past background (TR. 627) or by association. (TR. 628)

David Edvabsky: This witness said he did not keep up on current events and had heard of Murph the Surf only recently. (TR. 855) He drew no association with appellant's name. (TR. 857) In the jury room he heard no expressions of opinions of guilt or innocence. (TR. 858) He did know of appellant's conviction for murder (TR. 863) but said it didn't affect his opinion. (TR. 859, 869, 862) This juror had no previous knowledge of defendant's conviction for jewelry theft.

In fact he subsequently gained this knowledge only thru the help of petitioner's counsel.

Q. [by defense counsel] The fact that he is a convicted murderer and jewel thief, that would influence your verdict?

A. I didn't know he was a convicted jewel thief.

Q. Oh, I see. I am sorry I put words in your mouth.

(TR. 863)

William Izzard: Subsequently, to be the foreman of the jury, he remembered an insanity plea by appellant in the Whiskey Creek case, but his memory was otherwise vague. (TR. 916) He did not remember the extent of appellant's conviction with the Star of India case. (TR. 917) He stated he would not be influenced in the present case by a previous conviction for murder. (TR. 926)

Louise Scoggins: Mrs. Scoggins remembered reading about the case but would presume the appellant innocent. (TR. 950). The fact that other people in the community had voiced an opinion of guilt would not be an influence on her verdict.

(TR. 963) While upon examination by defense counsel she stated she would be influenced by prior convictions, she ultimately stated that she held no opinion so fixed that it would not yield to the testimony of the case. (TR. 972)

Daniel Ferguson: The final witness to be selected stated he was "sickened" by opinions of guilt he had heard in the jury room and personally believed "in the system". (TR. 1045-1046). He knew of a conviction in the Whiskey Creek case and other crimes. (TR. 1048-1050). He was unfamiliar with the present case. (TR. 1054) The juror did not remember appellant's prior adjudication of insanity (TR. 1058) and emphasized that he would believe appellant innocent until proven guilty (TR. 1063-1064). He would be uninfluenced by anything happening previously. (TR. 1066, 1069)

At this point it is important to mention that the state trial judge originally deferred ruling on petitioner's motion for venue change pending in-camera voir dire examina-

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tion.[7] (TR. 14) It was in light of the above statements of impartiality that the trial judge denied petitioner's motion and the trial proceeded.

Petitioner carries a heavy burden. In order to prevail he must satisfy this court that the above responses were sufficient to raise a "presumption of partiality."

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[7]The trial judge's choice of in-camera juror inspection was in accord with the recommendation of the Reardon Committee on Fair Trial and Free Press; A.B.A. Standards Relating to Fair Trial and Free Press § 3.4(a) Method of Examination (Approved Draft, 1968), cited with approval by the Committee on the Operation of the Jury System, Judicial Conference of the United States, 45 F.R.D. 391, 413 (1968). In Irvin, this court expressed its concern that assurances of impartiality, while sincere, suffered because the "psychological impact requiring such a declaration before one's fellows is often its father" 366 U.S. at 728. The judicious choice of an in-camera, limitless voir dire eradicated this concern.

That this is the burden imposed by Irvin v. Dowd, 366 U.S. 717 (1961), is made clear by Beck v. Washington, 369 U.S. 541 (1962), in the majority opinion of Mr. Justice Clark, who had written the majority opinion in Irvin, supra. In Beck, supra, this Court was asked to reverse the conviction of national labor leader Dave Beck on the ground "that such a strong case of adverse publicity has been proved that any jury selected in Seattle at the time he was tried must be held to be presumptively biased and that the trial court's adverse findings on his motion for a change of venue was therefore error." Beck, 369 U.S. at 556. In holding against Beck, the Court said:

> We cannot say the pretrial publicity was so intensive and extensive or the examination of the entire panel revealed such prejudice that a court could not believe the answers of the jurors and would be compelled to find bias or preformed opinion as a matter of law. Beck, supra at 557.

The assurances of impartiality presented here do not support the indulgence of a presumption that such bias or preformed opinion existed.[8]

Petitioner also contends that members of the jury panel had been discussing the case and many had thereby formed a preconceived opinion of petitioner's guilt of the crime charged. (Brief of Petitioner at 5-6.) This latter point is extremely tenuous in that some prospective jurors stated the veniremen had been discussing petitioner's case while

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[8]Sufficient weight must be given to the sophistication of American juries and their willingness to do what they can perceive with the aid of effective judges and trial counsel to be their solemn duty. The experiences of skilled trial judges and lawyers teaches that jurors, with pointed questions on their voir dire, instructions from the bench and closing arguments by counsel, can be inspired to judge cases on the evidence tendered to them in court and nothing else. Former Attorney General John Mitchell himself, having been acquitted once by a jury in United States v. Mitchell and Stans, 73 Cr. 439 (S.D. N.Y. 1973) is in a position to testify to that. Waltz, "Juries and the Mass Media" Nation, Nov. 16, 1974. Indeed juror assertion of impartiality despite exposure to pretrial publicity has been upheld by this court on numerous occassions. Hopt v. Utah, 120 U.S. 430 (1887); Spies v. Illinois, 123 U.S. 131 (1887). Thiede v. Utah, 159 U.S. 510 (1895); Holt v. United States, 218 U.S. 245 (1910); Beck v. Washington, 369 U.S. 541 (1962).

others, also awaiting voir dire, were equally adamant that they heard no discussion. Mrs. Essie Schweid, for example, flatly stated that nobody in the juryroom discussed the case (TR. 664-665), and Mrs. Patricia Esher stated that she heard some veniremen say defendant was guilty while others held the opposite view. (TR. 489) The record cannot therefore be used to support the contention that a widespread preconception of guilt was harbored by the panel, even before their final selection. Rather, any prejudice alleged by petitioner must not be based on speculation but must be shown "as a demonstrable reality." United States ex rel. Darcy v. Hardy, 351 U.S. 454, 462 (1956). This burden has not been met here.

Assuming that mere knowledge of a defendant's previous conviction does not rise to constitutional error (See Point I), the mere showing of pretrial publicity, absent a demonstration of jury bias, will not warrant a reversal. Respondent is aware that this Court has shown itself extermely sensitive to "official intrusion into the privacy of the jury" Sheppard v. Maxwell, 384 U.S. 33 (1966), but here there was nothing that by the widest stretch can be so regarded. There is no doubt that the voir dire is not the entire measure of what may upset a verdict. "The press may at times so poison the surrounding atmosphere that it is impossible to have a fair trial at all and the guilty would go free; but it would be to the last degree undesirable to upset judgments, in all other respects just and reasonable, because of circumambent gossamers which not only the jurors said had no influence upon them, but which would

not have had substantial influence upon anyone who was capable of impartial judgment." United States v. Allied Stevedoring Corp., 241 F.2d 925, 935 (2nd Cir. 1957). Since the trial judge is in a better position than a reviewing court to evaluate the answer of a prospective juror on voir dire, the jurors' assertion of impartiality should not be overturned unless it clearly appears, through an affirmative showing by petitioner, that the judge has acted in abuse of his discretion. Reynolds v. United States, 98 U.S. 145 (1898); Stroud v. United States, 251 U.S. 15 (1919) reh. den. 251 U.S. 380; United States v. Shaffer, 291 F.2d 689 (7th Cir. 1961) cert den. 368 U.S. 914 (1961); United States v. Titus, 210 F.2d 210 (2nd Cir. 1954).[9]

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[9]The opinion of the Fifth Circuit spoke to this precise point in affirming the denial of a petitioner's writ of habeas corpus. "The district judge found the presence of some objective criteria, Beck v. Washington, 1962, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98, in the nature and the time span of the pretrial publicity. We are in agreement with his determination that since the newspaper articles were largely factual rather than inflammatory, and since the dates of the news clippings and edited television news releases were almost entirely between December 15, 1967 and January 24, 1969 (only five articles being presented to the court bearing dates of the period of the jury selection and only one of those being a front-page article) the passage of time is a crucial factor in this case. We find no record basis upon which to disturb his finding that "each of the five jurors who had some knowledge of the facts of the Wofford robbery possessed only a vague recollection of the facts." 363 F.Supp at 1229. Murphy v. Florida, 495 F.2d 553 (5th Cir. 1974).

C. The Cases Upon Which Petitioner Relies For The Proposition That It Is Not Incumbent Upon Him To Demonstrate Actual Prejudice, Fall Within The Classification Of the Most Egregious Fact Patterns And Are Inapplicable To The Facts At Bar.

Petitioner has entirely failed to demonstrate the existence of actual prejudice on the part of the jury and the next inquiry should be directed to the necessity of such a showing. Traditionally this Court has required a criminal defendant to demonstrate that there was a nexus between the prejudicial publicity and his failure to receive a fair trial. See e.g., Beck v. Washington, 369 U.S. 541 (1962); Irvin v. Dowd, 366 U.S. 717 (1961); Stroble v. State of California, 343 U.S. 181 (1952). However, this Court has also determined that the conduct of the news media can in some instances be so inherently prejudicial and so persuasive in its effect that actual prejudice will be presumed. Such cases are Rideau v. Louisiana, 373 U.S. 723 (1963), where defendant's act of confessing was repeatedly televised in the community where he was tried; Estes v. Texas, 381 U.S. 532 (1965), where the courtroom was invaded by teams of television cameramen and photographers; and Sheppard v. Maxwell, 384 U.S. 333 (1966), discussed immediately hereafter. Petitioner apprently reads Sheppard as holding that where a community has been exposed to considerable pretrial publicity, it must be presumed that

his trial was not fair and impartial.[10] (Brief of Petitioner at 14-15.) Respondent respectfully urges that this is an erroneous interpretation. The following statement in the Court's opinion militates against such a contention.

> While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the Court's later rulings must be considered against the setting in which the trial was held. 384 U.S. at 352-53.

The presumption of prejudice approach was justified in Sheppard not merely because of the inflammatory pretrial publicity but because of the "totality of circumstances" attending his trial. Sheppard, 384 U.S. at 352. Those circumstances were as follows:

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[10]Respondent does not agree with the petitioner's contention that Sheppard overruled Irvin v. Dowd, supra, sub silentio. As a matter of fact, Irvin is cited by the majority in Sheppard, apparently with approval. 384 U.S. at 351.

1) A reenactment of the events of the fatal evening by Sheppard with newsmen present, but no attorney.

2) Newspaper stories about his alleged unwillingness to take a lie detector test.

3) An inquest, staged in the high school gymnasium with reporters and television cameras present. There was a live broadcast of the inquest on radio.

4) Publication of the names and addresses of all the veniremen in the local newspapers.

5) A special table for the approximately 20 reporters present which was set up at trial; testimony and pictures appeared in the press each day of the trial.

6) Damaging "testimony" by police and relatives which was never introduced at the trial but which appeared in local newspapers.

7) Permission for jurors to make daily unmonitored phone calls to their homes while sequestered at the trial.

The sum total of events at that trial produced an ultimate reversal. There is no possible comparison between that trial

or publicity, and the trial and publicity related to Jack Roland Murphy in the instant cause. This Court's task is one of analyzing all of the circumstances in petitioner's case to determine whether they were so egregious and inherently harmful as to obviate the necessity of showing actual prejudice. The Sheppard decision is perhaps the only yardstick. In Sheppard the signifcant circumstances included not only the pretrial activity of the newsmen but also their conduct and its effect during the trial. This phase of petitioner's case must also be examined.

Petitioner relies on a collection of newspaper clippings submitted as exhibits in the lower courts. (TR. 2406-2569) The dates on the great majority of these newspaper clippings show them to have been published between December 15, 1967 and January 24, 1969. Jury selection in the case began on July 27, 1970, more than eighteen months later. Only five (5) articles, have been presented by the petitioner bearing dates of the period of jury selection and of these only one was sufficiently newsworthy to warrant coverage on the front page of the paper's second section. The remaining articles appeared on the paper's back pages. While the time period between the publicity and petitioner's trial is certainly not a complete answer to the pretrial-publicity problem, delay has been recognized as having a significant ameliorating effect. See e.g., Beck v. Washington, 369 U.S. 541 (1962); United States v. Bowe, 360 F.2d 1 (2nd Cir. 1966); Corbett v. Patterson, 272 F.Supp. 602 (D. Colorado, 1967).

In United States ex rel. Rosenberg v. Mancusi, 445 F.2d 613 (2nd Cir. 1971), the Second Circuit reviewed a state prisoner's appeal from the denial of his habeas corpus petition on pretrial publicity grounds. In affirming, the court relied heavily on the time span between the initial flurry of news at the time of the crime and defendant's trial nine months later. In its consideration of this Court's prior decisions on pretrial publicity the Second Circuit noted that:

> The opinions in Sheppard and Estes are, of course, very instructive on the dangers of adverse publicity, although both decisions turned on the circus atmosphere created by the publicity during the respective trials, a factor which is decidedly absent here. at 617

The rationale for giving consideration to this factor is that notwithstanding any prejudice originally engendered upon the release of the publicity, with the passage of time this prejudice would be greatly diminished or dulled. The time factor was the main ingredient causing reversal by this Court in Rideau (trial two weeks after filmed confession shown on television), Estes (television transmission during the trial proceedings) and Sheppard (publicity, newsmen inside courtroom bar and and communication during the trial), and greatly contributed to a finding of prejudice in those cases.

Unlike the news coverage of the Sheppard case, the newspaper stories carried by the Miami Herald, Miami News, Miami Beach Sun and Sun-Sentinel were in no sense acusatory or vindictive. They were generally objective and straightforward, although the amount of factual data they imparted was unusually great.

In Sheppard the news media frequently carried editorials in which the prosecuting authorities were urged to give Sheppard the "third degree" and assailed for their "fumbling" of the case. The editorials unquestionably bore the hallmark of accusation.

The following are some of the headlines which appeared in the Cleveland newspapers prior to the Sheppard trial: "Quit Stalling and Bring Him In"; "Sam Declined July 4 Lie Test"; "Says Dr. Sam Talked Divorce"; "Testified Sam Changed Stories"; "Charges Sam Faked Injuries"; "Marilyn called Sam a Jekyll-Hyde"; "Kerr Called Dr. Sam a Bare Faced Liar"; "Doctor Re-enacts Story of Murder; Rejects Lie Test"; "But Every Moment of Fumbling is Helping a Murder Escape"; "Sheppard Set For New Quiz"; "Getting Away with Murder; An Editorial"; "Why No Inquest? Do It Now, Dr. Gerber"; "Get That Killer"; "Why Don't Police Quiz Top Suspect; An Editorial"; "Why Isn't Sam Sheppard In Jail?"; "Who Will Speak for Marilyn"; "Dr. Sam Faces Quiz at Trial on Marilyn's 'Fear of Him'"; "Police Assert Couple Had Violent Rows". See the various opinions on the Sheppard case in 384 U.S. 333 (1966); 346 F.2d 707 (6th Cir. 1965), 231 F.Supp. 37 (S.D. Ohio 1964); State v. Sheppard, 165 Ohio St. 293, 135 N.E.2d 340 (1956), and 100 Ohio App. 345, 128 N.E.2d 471 (1955).

The editorial campaign against Sheppard was even carried on by cartoons. See 231 F.Supp. at 52-53. The approach of one newspaper, the Cleveland Press, was described by the federal district court:

> For some reason that paper took upon itself the role of accuser, judge and jury. The journalistic value of its front page editorials, the screaming, slanted headlines and the nonobjective reporting was nil, but they were calculated to inflame the public. 231 F.Supp at 63.

A comparison to the case sub judice shows a sharp contrast to the "circus-like" atmosphere in Sheppard.

Not only was the pretrial publicity in petitioner's case far less prejudicial and vindictive than in Sheppard, but the atmosphere at trial was calm and serene in comparison with the bedlam which reigned at the Sheppard trial. It therefore can be concluded that the circumstances attending the investigation, arrest, detention and trial of petitioner falls far short of the "totality of aggravating circumstances" in Sheppard. The distinctions in petitioner's case which are most salient include the delay between most of the pretrial publicity and the trial, the lack of vindictiveness of the publicity, absence of official comment regarding the evidence, the in-camera voir dire and the orderliness of the trial proceedings.

Petitioner next relies on Rideau v. Louisiana, 373 U.S. 723 (1963) and Estes

v. Texas, 381 U.S. 532 (1965) to support his contention that there has been adopted a new standard for reviewing pretrial publicity cases. In Rideau, this court found that the minimal constitutional standards of due process were lacking when the accused was forced to trial before a jury where three of the veniremen had seen and heard Rideau's televised confession to the crime while an additional two members of the jury were deputies of the police department responsible for the confession. Because these extraordinary facts were so charged with the potential for prejudice, this Court found it unnecessary to reach the issue of whether petitioner established a nexus between the televised confession and prejudice of the trial jury. In Estes, holding the televising and broadcasting of defendant's trial inherently deprived him of his right under the Fourteenth Amendment to due process of law, this Court again distinguished between those cases involving inherently prejudicial publicity requiring no showing of actual prejudice or nexus between community and jury sentiment, and the basically different class of cases arising from less grievous threats to the fairness of the trial.

The holding in Estes was not an innovation but rather a continuation of that principle expressed in Tumey v. Ohio, 273 U.S. 510 (1927) that:

> . . .the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could

> carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man. . .to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law. At 532. (Emphasis supplied.)

Estes, supra, 381 U.S. at 543.

Nor was it a recession from Stroble v. California, 343 U.S. 181 (1952), and Irvin v. Dowd, supra, but a necessary extrapolation thereof guiding those cases encompassing the most extreme violations. By logic as well as precedent the totality of the circumstances test espoused by Irvin v. Dowd, supra, requiring the federal habeas corpus court to assume the ". . .duty to make an independent evaluation of the circumstances" Sheppard v. Maxwell, 384 U.S. 333 (1966) is an absolute necessity for fairly resolving those challenges based on pretrial publicity that possibly though not clearly may have affected the fact finding process of the trial. It must be deemed controlling of cases such as the one at bar in which the trial itself is not extraordinary and the community's climate of opinion as to the defendant is not inherently suspect, raising no probability of unfairness.

Appellant's reliance on United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1963), as a parallel to the instant case, is unfounded. There a series of

killings occurred in a small county, thoroughly alarming its residents and leading to inflammatory newspaper reports of a "mad killer". Much of this publicity was fostered by the prosecution. Local interest in the trial was intense due to the general fear that a finding of insanity would free the mad killer to strike again.

There is no similarity between this general fear and apprehension of the small community in Bloeth, and the reaction in Dade County at the time of appellant's trial. As in Beck v. Washington, supra, the complained of publicity was in fact diminishing prior to the beginning of the petitioner's trial. There is no evidence of such a fervor in the community as to result in widespread hostility, as was the case in Pamplin v. Mason, 364 F.2d 1 (5th Cir. 1966), where the prejudice was racial. In Dade County, by contrast, when one juror was asked his impression of "Murph the Surf" he responded "Well, more or less as a character that the Miami Herald created, a fantasy. I can't connect him with a live human being, a person." (TR. 1048)

In sum this court is guided by the teaching of Irvin v. Dowd, supra and Beck v. Washington, supra. This lesson seems to be that this Court will not reverse convictions notwithstanding extensive pretrial publicity, unless the nature of the publicity is to arouse such rage and revulsion as would create bitterness and deep seated prejudice, and such prejudice is reflected and confirmed by expressions on the part of the overwhelming majority

of the persons questioned on voir dire, as well as by a substantial proportion of the jurors actually impaneled. In Irvin, prejudice was clearly reflected where eight of the twelve jurors stated on voir dire their belief in defendant's guilt. In addition, Irvin's oral confession to authorities appeared in newspapers the day before the trial commenced. In the instant case, petitioner has alleged no prejudice which is analogous to those cases where this Court has been compelled to order a new trial. Since the record in this case supports the existence of impartiality and a courtroom free of "identifiable prejudice" Estes, supra, petitioner's claim of judicial error must be denied.

D. Assuming Arguendo, That The Trial Judge Erred In Denying Petitioner's Motion For Change Of Venue, Such Error, In Light Of the Overwhelming Evidence Was Harmless Beyond A Reasonable Doubt.

The evidence presented by the State at trial was overwhelming. The petitioner was apprehended at the scene of the crime immediately after the police interrupted that crime in process. (TR. 1828)

The State's first witness was Officer Ducharme of the Miami Beach Police Department. He responded to an alarm at the home of Olive Wofford, a wealthy Beach

Socialite. Upon his arrival, Ducharme saw a man in blue running from the Wofford house. At trial he identified that man as the petitioner. (TR. 1765)

One of the victims testified that a man in a blue jacket broke in, held her at gun point and threatened physical violence unless she cooperated. (TR. 1931-46) The officers who arrived on the scene identified the man in the blue jacket as petitioner (1765, 1824). In addition testimony at trial revealed that petitioner attempted to escape police by diving through the glass door at the rear of the Wofford home. (TR. 1828)

Upon arrest petitioner was cut and bleeding from such gashes about his chin and neck that officers felt he needed immediate medical treatment. Petitioner shortly thereafter was taken directly to a local hospital where glass fragments were removed from his neck. (TR. 1830) At trial a police chemist compared these fragments with the glass door at the Wofford home and testified that they matched. (TR. 1873) Next, the supervisor of the police lab was called to testify about a comparison he made with the blood found on the glass door and a sample taken from petitioner. His testimony was that the comparison showed that the samples matched and the blood on the door was that of petitioner. (TR. 1868) The lab technician next testified that the latents on the glass door positively matched those of defendant (TR. 1886-1888). Finally, a comparison of the projectiles take from the wall in the Wofford home were compared with petitioner's weapon

and the testimony showed a good possibility that the bullets in fact came from petitioner's gun. (TR. 1987)

This Court held in Chapman v. California, 386 U.S. 18 (1966), that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Id. at 24. Although "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error" (id. at 23), not all "trial errors which violate the Constituiton automatically call for reversal." Ibid

The mere finding of pretrial publicity should not automatically require reversal of the ensuing criminal conviction. In some cases the evidence of guilt is so overwhelming, and the prejudicial effect of the publicity is so insignificant by comparison, that it is clear beyond a reasonable doubt that failure to grant a change of venue was harmless error. Such a proposition is the logical extension of this Court's decision in Schneble v. Florida, 405 U.S. 427 (1972); Harrington v. California, 395 U.S. 250 (1969); and Chapman supra. The remarks of Mr. Justice Rehnquist in Schenble bear particular elevance to the case at bar:

> Judicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions, stares us in the face. Schenble, 405 U.S. at 431-32.

Emphirical studies support the extrapolation of the "harmless error" rule to the case at bar.[11]

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[11]An analysis of the following data presents a "rational explanation" for the jury verdict in the instant case.

Drs. Stanley Sue and Ronald E. Smith, of the University of Washington, recently tested the effects of inadmissible evidence and pretrial publicity on subjects who assumed roles as jurors. They gave 105 university students a description of a grocery store robbery in which the owner and his five-year old granddaughter were killed. The group was also given an account of the suspect's apprehension by the police and a summary of the evidence presented by the prosecution and defense at the ensuing trial. Half of the students were given cases with strong evidence against the defendant, the other half read weak cases for the prosecution. To test the effects that inadmissible evidence had on individual verdicts, some persons in each group received additional incriminating evidence that was declared either admissible or inadmissible. The control groups received no additional information. When the three subgroups were compared no significant difference was found among the groups in the percentage of guilty verdicts, where the evidence was strong. The study concluded: "It appears that the biasing effect of inadmis- decision. The controversial evidence then becomes quite salient in the juror's mind. On the other hand, when there is already strong evidence against the defendant, the inadmissible evidence seems to have little effect on a juror's verdict." Smith & Smith, "Psychology Today", May 1974 p. 86, 90.

Respondent submits that the overwhelming evidence presented at trial against the defendant supports a rational explanation for the guilty verdict. "Reasonable minds of an average jury" would not have found the State's case significantly less persuasive had they not been exposed to newspaper coverage. As Mr. Justice Douglas concluded in Harrington v. California, 395 U.S. 250 (1969):

> Our decision is based on the evidence in the record. The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we can say that no violation of Bruton can constitute harmless error, we must leave this state conviction undisturbed. Id. at 254.

A substitution of Murphy and Sheppard respectively, in the above quotation would aptly describe the condition of the present case.

CONCLUSION

The respondent respectfully submits that the petitioner has failed to demonstrate that any federal constitutional rights have been violated. In the absence of a clear showing that the Florida practice employed is violative of the federal Constitution, this Court is under no legal or moral obligation to reverse the decision before this Court.

The respondent has, without question, shown that the alleged constitutional abridgements are instead appropriate rulings presaged by former opinions of this Court and by the well-reasoned opinions of the lower courts.

The State of Florida would respectfully urge that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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